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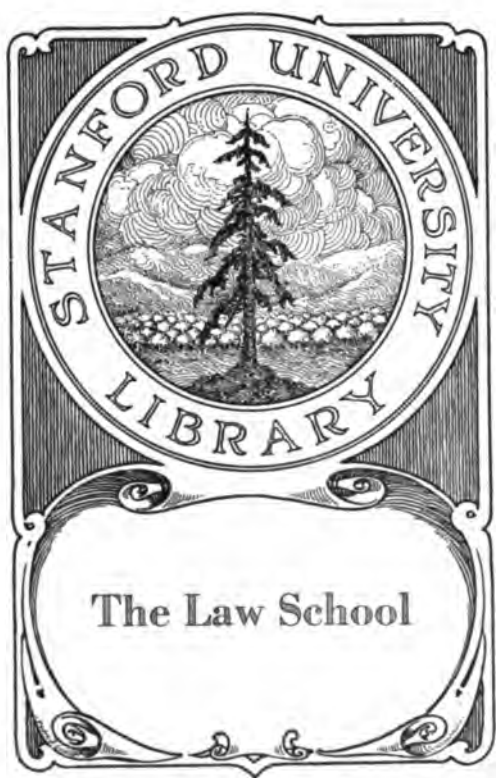
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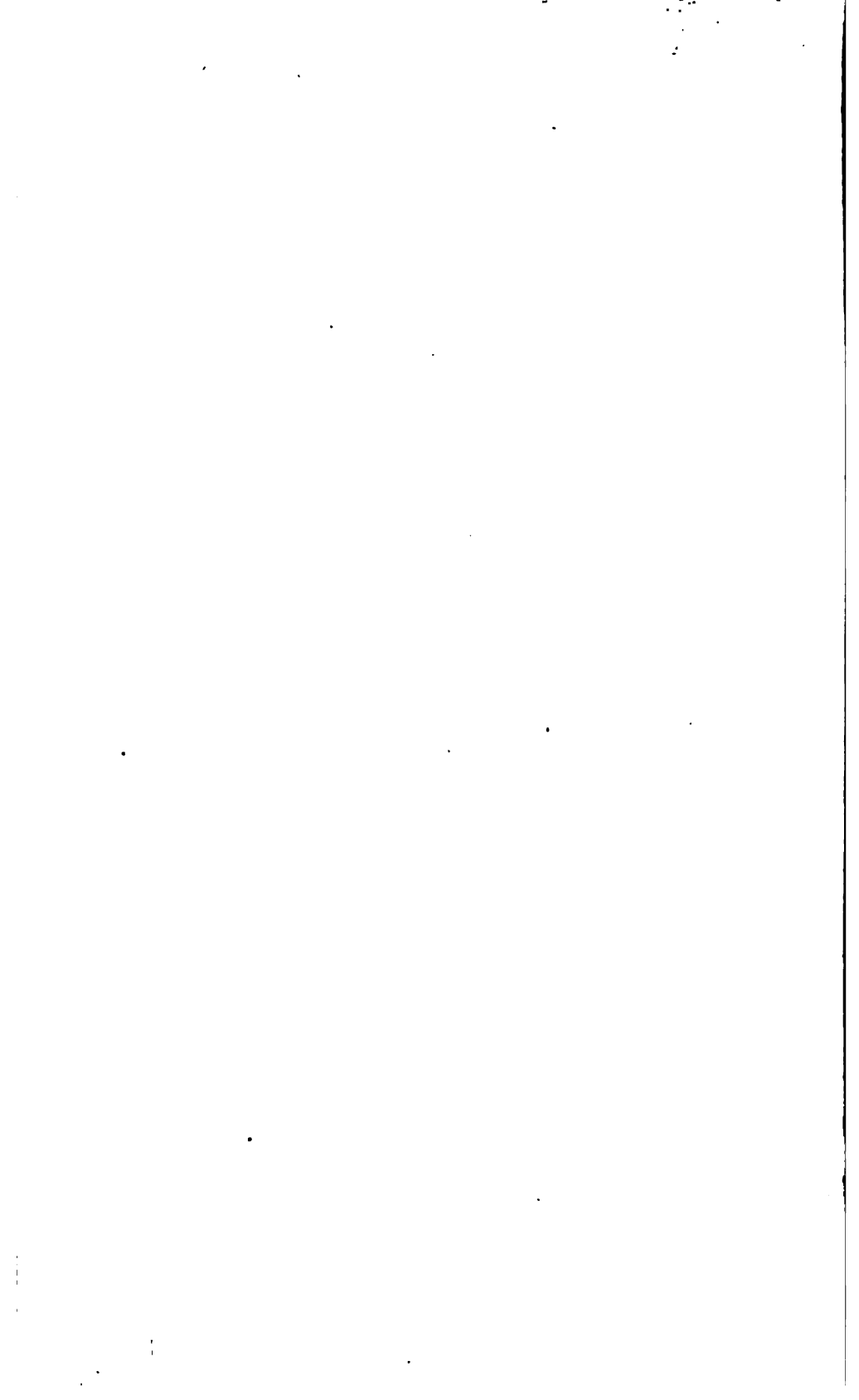
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H. L. GUILLASPIE









REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

English Courts of Common Law.

Gilliespie

HERETOFORE CONDENSED BY

HON. THOMAS SERGEANT AND HON. THOMAS M'KEAN PETTIT.

Now Reprinted in Full.

VOL. LII.

CONTAINING

The Cases in the Court of Common Pleas, in Michaelmas Term and Vacation, 1845, and Hilary Term and Vacation, and Easter Term, 1846.

PHILADELPHIA:

T. & J. W. JOHNSON & CO., LAW BOOKSELLERS,

NO. 535 CHESTNUT STREET.

1871.

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COMMON BENCH REPORTS.

CASES ARGUED AND DETERMINED

IN

THE COURT OF COMMON PLEAS,

IN

MICHAELMAS TERM AND VACATION, 1845, AND HILARY TERM
AND VACATION, AND EASTER TERM, 1846;

WITH TABLES OF THE NAMES OF CASES ARGUED AND OF
THE PRINCIPAL MATTERS.

BY

JAMES MANNING,

SERJEANT AT LAW;

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BARRISTER AT LAW;

AND JOHN SCOTT,

OF THE INNER TEMPLE, ESQ., BARRISTER AT LAW.

VOL. II.

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1871.



JUDGES
OF
THE COURT OF COMMON PLEAS,
DURING THE PERIOD COMPRISED IN THIS VOLUME.

The Right Hon. Sir NICOLAS CONYNTHAM TINDAL,
Knt., Ld. Ch. J.

The Hon. Sir THOMAS COLTMAN, Knt.

The Hon. Sir WILLIAM HENRY MAULE, Knt.

The Hon. Sir CRESSWELL CRESSWELL, Knt.

The Hon. Sir WILLIAM ERLE, Knt.

ATTORNEY-GENERAL.

Sir FREDERICK THESIGER, Knt.

SOLICITOR-GENERAL.

Sir FITZROY KELLY, Knt.



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CASES

UPON APPEAL FROM THE DECISIONS OF REVISING BARRISTERS,

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN

Michaelmas Term and Vacation, Hilary Term and Vacation, and
Easter Term.

IN THE NINTH YEAR OF THE REIGN OF VICTORIA.—1845.

EASTERN DIVISION OF GLOUCESTERSHIRE.

SEPTIMUS PRUEN, Appellant, JOHN SURMAN COX, Respondent. *Nov.* 13.

In a notice of objection, the objector described himself as of "No. 398 High Street, Cheltenham, on the register of voters for the parish of Cirencester." On the register so referred to, the objector was described as of "Cheltenham" only:—*Held*, that the notice was sufficient.

THE notice of objection was duly given, and was in proper form; but the objector described his place of abode as "No. 398 High Street, Cheltenham," and "on the register of voters for the parish of Cirencester." The name of the objector was on the list (a) *of voters for the parish of Cirencester, in the said division; but the place of abode, as described in that list, was "Cheltenham" only. [*2]

Cheltenham is a parish within the said division, and No. 398 High Street is within the said parish of Cheltenham, and is the true place of abode of the objector.

It was contended, that the objector ought to have omitted No 398 High Street, in the description of his place of abode, and described it, generally,—Cheltenham only, as it appeared in the register of voters.

The revising barrister thought the description sufficient; and,—the party being unable to prove the qualification,—his name was expunged.

If the court shall be of opinion that the decision was wrong, the name is to be restored, as well as the names of sixty persons whose names were expunged under similar circumstances, and whose appeals are consolidated with the principal case.

(a) i. e. on that part of the register for the division, which relates to the parish of Cirencester.

Cockburn, for the appellant. The notice of objection must, according to the 6 & 7 Vict. c. 18, s. 7, sched. (A.), No. 5, describe the objector precisely as he is described in the register or list of voters : and two of the judges of this court, in *Gadsby*, app., *Warburton*, resp., 7 M. & G. 11, 8 Scott, N. R. 775, held that such a description will in *all* cases suffice. MAULE, J., there says : "The seventh section of the registration act requires a notice of objection to be given 'according to the form numbered 5, in the schedule (A.), or to the like effect.' In that form, the words 'place of abode' are in a parenthesis, after the words 'A. B. of,' in order to show that the place of abode is *there* to be inserted. And it seems to me that this means the place of abode *as inserted in the list of voters*, in order to show that the objector is *3] on that list and *entitled to object ; it being absolutely necessary that the place of abode of a voter should appear on the list. Whether it would be necessary, in the case of a change of abode after the list had been published, to insert the latter place of abode in the notice of objection, it is not necessary to decide. The inclination of my own mind is, that it would not be necessary. I am confirmed in this opinion by the expression in the form 'A. B. of,' &c. The word 'of' is indicative rather of a place *of which a party is described*, than of a place *from which a notice is sent*. In the latter case, the place is generally put without the addition of the word 'of,' and is used as a date. For instance, in the form given in No. 4, in the same schedule, the word 'of' is not put ; but it ends thus—(Signed) A. B. [*place of abode.*] In the form of notice under consideration, I think it was meant that the place of abode should be stated as given in the list of voters. The seventh section says, the notice is to be 'to the like effect' with the form given in the schedule. What is the meaning of that ? To effectuate the object intended by the notice, namely, to show that the objector is on the list of voters." And ERLE, J., says : "The barrister seems to have thought that the place of abode of the objector should be stated differently in the notice of objection from that which appeared in the list of voters. It appears to me that the 'place of abode' required to be stated by the act, has the same meaning in both instances ; and this, as well under the reform act as under the registration act. And it is extremely convenient that the same description should be given ; the main object of the description being that the voter may be enabled to ascertain that the objector has a right to object. I am even inclined to think, that, if the objector retained the same place of abode as that mentioned in the list, and purposely changed the description in his notice, by adding the parish, it might be *invalid." *4] [MAULE, J. The words "on the register," &c., are merely inserted to show that the objection is made by a person who is qualified to object. ERLE, J. The notice surely is not vitiated by the addition of a particular giving the party further information.]

Byles, Serjt., (with whom was *Grove*,) for the respondent, asked for costs.

TINDAL, C. J. The notice in question sufficiently complies with the form given in the schedule referred to. It may be read as if "No. 398 High Street" was in a parenthesis. The case being so very clear, the decision of the barrister must be Affirmed with costs.

CITY OF LICHFIELD.

WILLIAM BARTON, Appellant, THOMAS ASHLEY, Respondent.
Nov. 17.

A notice of objection delivered to the overseers under the 6 & 7 Vict. c. 18, s. 17, sched. (B), No. 10, where there are more lists than one made out by the overseers, must specify the particular list to which the objection refers.

WILLIAM BARTON objected to the name of Thomas Ashley being retained on the list of persons entitled to vote in the election of members for that city. The objector gave in evidence, and duly proved the service of, a notice of objection upon the said Thomas Ashley, according to the form No. 11, in sched. (B) of the statute 6 & 7 Vict. c. 18; and he also gave in evidence and proved the service of a notice of objection upon the overseers of the parish of St. Michael, in the list of *which parish, containing the names of persons entitled to vote [5 in the election of members of parliament for the said city, by virtue of the provisions of the statute 2 W. 4, c. 45, the name of the said Thomas Ashley appeared as follows; that is to say,

"The list of persons entitled to vote in the election of members for the city of Lichfield, in respect of property occupied within the parish of St. Michael, by virtue of an act passed in the second year of the reign of King William the Fourth, intituled, 'An act to amend the representation of the people in England and Wales.'

Christian Name and Surname of each Voter.	Place of Abode.	Nature of Qualification.	Street, Lane, or other like Place in this Parish, and Number of House where the Property is situated.
Ashley, Thomas.	Greenhill.	House.	Greenhill.

The last-mentioned notice of objection was in the following words:—

"Notice of objection.

"To the overseers of the parish of St. Michael, in the city of Lichfield.

"I hereby give you notice that I object to the name of Thomas Ashley being retained in the list of persons entitled to vote in the election of members for the city of Lichfield. Dated, this 25th of August, 1845.

(Signed) "WILLIAM BARTON, of Stone street, Lichfield,
on the list of freemen for the city of Lichfield."

In the city of Lichfield, it is the duty of the overseers of the several parishes,—and, amongst the rest, of the said parish of St. Michael,—to make out and publish two separate lists of persons entitled to vote in the *6] election *of members for the said city; the one, in respect of persons entitled to vote in the election of members for the said city, in respect of property occupied within the said parish, by virtue of the provisions of the statute 2 W. 4, c. 45; and the other, of persons not being freemen, entitled to vote in the election of members for the said city, in respect of any right other than those conferred by the said last-mentioned statute. The name of the said Thomas Ashley appeared on the first-mentioned list of voters only, namely, on the list of persons entitled to vote by reason of the provisions of the statute 2 W. 4, c. 45, and did not appear on the other list made out and published by the overseers.

In the list of objections published by the overseers, the said Thomas Ashley was described as follows:—

Christian Name and Surname.	Place of Abode.	Nature of Qualification.	Name of Street, &c., where situate.
Ashley, Thomas.	Greenhill.	House.	Greenhill.

agreeing with his description in the original list of persons entitled to vote in respect of property occupied within the said parish, by virtue of the said statute of 2 W. 4, c. 45, as hereinbefore set forth.

It was objected, on the part of the said Thomas Ashley, that the said notice of objection served on the overseers, was informal and insufficient, inasmuch as it did not comply with the directions given in schedule (B), No. 10, of the statute of 6 & 7 Vict. c. 18; there being two lists of voters made out by the overseers in that parish, and the notice not specifying, as it ought to have done, the particular list to which the objection referred.

The revising barrister held the notice to be informal and insufficient for that reason: but, as the said Thomas Ashley was present, and then consented that the proof of his qualifications should be gone into, sub- *7] ject to the *question of the validity of the said notice of objection, he proceeded to call evidence in support of his right to have his name retained in the said list; but failed to prove the same to the satisfaction of the barrister.

The question for the opinion of the court is, whether, upon the facts stated, the above notice of objection to the overseers of the said parish of St. Michael, was or was not sufficient in law to call upon the said Thomas Ashley to prove his title to have his name retained in the list of persons entitled to vote in the election of members for the city of Lichfield, in respect of property occupied within the said parish, by virtue of the said statute of 2 W. 4, c. 45. If the court shall be of opinion that

the said notice was sufficient, the name of the said Thomas Ashley is to be expunged from the register of voters for the said city; otherwise, to be retained thereon.

The cases of three other persons whose names appeared on the list of voters for the parish of St. Michael, and two whose names appeared on the list of voters for the parish of St. Mary, in the same city, are consolidated with the principal case.

Kinglake, Serjt., for the appellant. By the thirteenth section of the 6 & 7 Vict. c. 18, the overseers of every parish or township are required to make out two lists of persons entitled to vote—the one, a list “of all persons who may be entitled to vote in the election of a member or members to serve in parliament for such city or borough, in respect of the occupation of premises of the clear yearly value of not less than 10*l.*,” &c.—the other, a list “of all other persons (except freemen) who may be entitled to vote in the election of such city or borough, by virtue of any other right whatsoever.” And sect. 17 enacts, “that every person whose name shall have been inserted in any list of voters for *any [8 city or borough, may object to any other person as not having been entitled on the last day of July next preceding, to have his name inserted in any list of voters for the same city or borough; and every person so objecting shall, on or before the 25th of August in that year, give, or cause to be given, a notice according to the form numbered (10) in schedule (B), or to the like effect, to the overseers who shall have made out the list in which the name of the person so objected to shall have been inserted; or, if the person objected to shall have been inserted in the list of freemen of any city or borough, except the city of London, then to the town-clerk of such city or borough; and every person so objecting shall also give to, or cause to be left at the place of abode of, the person objected to, as stated in the said list, a notice, according to the form numbered (11) in the said schedule (B), &c.” Under the 2 W. 4, c. 45, s. 47, the only notice of objection required was a general notice to the overseers, and the same lists were then required to be made out as now: the seventeenth section of the 6 & 7 Vict. c. 18, for the first time requires notice also to the party objected to. The notice to the party is a mere general notice. To that required to be given to the overseers is appended a note, intimating, that, if there be “more than one list of voters, the notice of objection should specify the list to which the objection refers; and, if the list contains two or more persons of the same name, the notice should distinguish the person intended to be objected to.” The only object of that note is, to require that, in cases where the voter’s name appears on both lists, such information shall be conveyed to the overseers as to enable them to ascertain whether the objection applies to the qualification in both lists, or to which of them—to point their attention to the particular qualification intended to be [9 objected to. If the voter’s name appears only upon *one list, the

information would be useless. All the overseers can require is, such a degree of information as will enable them to perform the duty imposed upon them by s. 18, of publishing a list of persons objected to, according to the form in schedule (B), No. 12: and that is done here. A strict and rigid compliance with the form is not necessary. It is enough if the direction is substantially complied with: *Gadsby*, app., *Warburton*, resp., 7 M. & G. 11, 8 Scott, N. R. 775. The case of *Wansey*, app., *Perkins*, resp., (a) though different in its facts from the present, somewhat approximates in principle. It was there held that the note in question is not applicable in the city of London, where the overseers make out only the list of householders, the list of freemen being made out by the secondaries. In *Allen*, app., *House*, resp., 7 M. & G. 157, 8 Scott, N. R. 987, in the case of a borough where the overseers had to make out two lists, one, being of parties entitled to vote under the 2 W. 4, c. 45, s. 27, the other, of potwallers, it was held that a notice of objection to the name of a party being retained "on the list of persons entitled to vote as householders," was sufficient, although the words "as householders" are not in the form given by the 6 & 7 Vict. c. 18. TINDAL, C. J., said: "It appears to me that this is substantially a good notice, although the words 'as householders' are inserted. If the insertion of those words could have misled the party objected to, then the notice, not being in strict compliance with the form given in the act, would have been bad. If the form had been exactly followed, it would have merely said, 'I object to your name being retained on the list of persons entitled to vote in the *10] election of members, &c.' Here, the objector has stated every word that is given in the form, and has inserted some that are not there. I think, however, that the principle *utile per inutile non vitiatur* applies, it not being shown that the party was misled, or that he was put to any inconvenience or extra expense." And CRESSWELL, J., said: "If the departure from the prescribed form had been likely to divert the attention of the party to a wrong list, I think the notice would have been bad. But this notice could not possibly have that effect." So, here, it may be admitted, that if the overseer's attention could have been distracted by the form of notice given, the decision of the revising barrister would have been correct. But this notice could not possibly have such an effect. At all events, the clause being directory only, and the overseer having acted upon the notice by publishing the name of the party objected to, as he would have done if the notice had been in the specific form required, no exception can be taken to it. [MAULE, J. You contend that there is no necessity for proving the notice before the revising barrister, provided the overseer has inserted the name of the party in the list of persons objected to.] The object of the notice to the overseers is, to enable them to publish the list, which the parties objected to may see at the church door, and so ascertain the particular qualifications to

(a) *Quigley's case*, 7 M. & G. 127, 8 Scott, N. R. 954.

which the objections apply. The list being published, the preliminary step is unimportant. Here, the overseers have received the notice, and have acted upon it as they would have done if the interpretation of the clause that is relied on by the respondent were the correct one.

Byles, Serjt., for the respondent, was not called upon.

TINDAL, C. J. The fortieth section of the 6 & 7 Vict. c. 18, which provides that the objector shall prove before the revising barrister that he gave the notices *required by the act, disposes of the argument last urged. As to the other point, the words of the direction—
“if more than one list of voters, the notice of objection should specify the list to which the objection refers”—are so clear that they admit of no doubt in their construction. Here, all that can be said is, that the omission to specify the particular list did not in fact create any confusion or difficulty. (a) But I think it is much more convenient that the overseer should have his attention distinctly called to the list, and that it is safer to adhere to the words of the act, and to hold that the notice must be in strict conformity with it in this respect. [*11]

COLTMAN, J. Comparing the form (I), No. 5, in the 2 W. 4, c. 45, with the form of notice given by the 6 & 7 Vict. c. 18, it would seem that the legislature considered the former not stringent enough, and therefore required something more precise and specific.

MAULE, J. I agree with the revising barrister that the notice in question was not according to the form No. 10, or to the like effect. I also agree that, provided the effect is preserved, strict compliance with the form may not be material. If, however, the proper form had been adopted here, the overseers would have been saved some trouble. It is true, that, by a little additional labour, the overseers may come to the same result through an informal and imperfect notice, as they would through one strictly conformable to the statute. But the object of the note at the end of the form No. 10, is, to save them that additional labour. Suppose the statute required a reference to a volume and page, and the volume were given without the page; could it be *said to be a virtual compliance, because, by a little additional labour, the party might find the page? [*12]

ERLE, J. It appears to me that the 6 & 7 Vict. c. 18, requires the notice to the overseers to be in a particular form, and that this particularity was intentionally prescribed, inasmuch as it departs from the form previously given by the 2 W. 4, c. 45. It is suggested that the form need not be strictly followed, provided no inconvenience results in the particular case from a departure from it. To that doctrine, however, I cannot accede.

Decision affirmed, with costs.

(a) Upon every notice of objection in this form, the overseer would have to examine two lists instead of one.

COUNTY OF MIDDLESEX.

WILLIAM HENRY WALKER, Appellant, JULIAN PAYNE,
Respondent. Nov. 17.

In a list of voters for a county, a voter was described in the column headed "Place of abode," as "travelling abroad:"—*Held*, a sufficient description.

THE name, place of abode, and qualification of William Gibbs, as a voter in respect of property situate within the hamlet of Mile End Old Town, were described in the register of voters for the said county, in the following words:—

Christian Name and Surname of each Voter at full Length.	Place of Abode.	Nature of Qualification.	Street, &c., where Property situate, &c.
Gibbs, William.	Travelling abroad.	Freehold house.	82 Heath St.

This name was objected to by the appellant; and it was proved that the voter was, and for several years had been, travelling abroad, and had
 *13] no fixed place of abode: but it was contended by the appellant, that, as no place of abode was given, the name ought to be expunged.

The revising barrister was of opinion, that, as the voter had no fixed place of abode, but was travelling abroad, he was not at liberty to expunge the voter's name, and he therefore retained it.

If the court of Common Pleas shall be of opinion that a better description of the voter's place of abode, under the circumstances above stated, ought to have been required, the name is to be expunged; else, to be retained.

G. Atkinson, for the appellant. This amounts to a case of total omission of the place of abode of the voter. By the 2 W. 4, c. 45, ss. 37, 38, the overseers are required to make out lists of persons entitled, or claiming to be entitled, to vote in the election of knights of the shire; and in the forms contained in schedule (H), examples are given as to how the second column is to be filled up—"Cheapside, London, &c." These examples are not repeated in the forms given in schedule (A), of the 6 & 7 Vict. c. 18; but the two acts, being *in pari materia*, must receive the same construction. The object of the legislature in requiring the place of abode of the voter to be inserted in the register, is, to give the means of identifying him when he comes to vote. That object will be frustrated if such a description as this is held to suffice. By the forty-sixth section of 6 & 7 Vict. c. 18, power is given to the barrister to award costs in certain cases to parties claiming or objecting; and by sect. 71, it is enacted, that such costs shall be levied, after service of the order *at the place of abode* of the party, by distress and sale of his goods

under a justice's warrant. Here, it would be impossible to put [*14] that provision in force: and it would be equally impossible to serve the party with a notice of objection under the seventh section.

Phipson, for the respondent, was not called upon.

TINDAL, C. J. The fortieth section of the 6 & 7 Vict. c. 18, enacts, that, wherever the Christian name, or the place of abode, &c., of any person who shall be included in any list, shall be wholly omitted, in any case where the same is by the act directed to be specified therein, or, if the place of abode, &c., shall in the judgment of the revising barrister be insufficiently described for the purpose of being identified, such barrister shall expunge the name of every such person from such list, unless the matter or matters so omitted, or insufficiently described, be supplied to the satisfaction of such barrister before he shall have completed the revision of such list. That direction means, that the place of abode of the party shall be inserted in the list if he has a place of abode. It was clearly not intended that he should lose his vote, because he happens to have no fixed place of abode at the time the lists are made out; otherwise every officer in the army or navy on foreign service, and every person abroad on public duty, would be disfranchised.

COLTMAN, J. Nothing is omitted that could have been inserted. I think the act is sufficiently complied with, notwithstanding there may be a difficulty in the service of notices.

MAULE, J. I also think that the place of abode is only required to be given where the party *has* a place of abode. The act likewise requires the Christian name *to be inserted: and yet no one would contend [*15] that a person who happens to have no Christian name would be thereby disqualified.

ERLE, J. The place of abode must be specified if the party has one. Where he is travelling abroad, such a description as is here given is as near a compliance with the act as the circumstances of the case will admit of.

Decision affirmed.

COUNTY OF MIDDLESEX.

WILLIAM HENRY WOOD, Appellant, The Overseers of the
Parish of WILLESDEN, Respondents. Nov. 17.

A party whose name appeared on the register for a county, was objected to on the ground, that the property was not sufficiently described therein for the purpose of being identified. The barrister having decided that the description was sufficient, the court declined to interfere.

An objection to the sufficiency of the description of a voter's place of abode, described as "The Grove, Neasdon, in this parish," Neasdon being in the parish mentioned in the heading of that part of the register, was abandoned.

The name, place of abode, and qualification of Henry Hall as a voter in respect of property situate within the parish of Willesden, were

15 WOOD, App. WILLESDEN Parish. Resp. M. T. 1845.

described in the register for the said county for the previous year, 1844. in the following words:—

Christian Name and Surname of each Voter at full length.	Place of Abode.	Nature of Qualification.	Street, &c., where Property situate, &c.
Hall, Henry.	The Grove, Neasdon, in this Parish.	House and Land as Occupier.	Neasdon.

*16] *This name was objected to by the appellant ; and it was proved that the voter's place of abode was at the Grove, Neasdon, in the parish of Willesden, and that he occupied a house and land at Neasdon, for which he was *bonâ fide* liable to upwards of 50*l.* yearly rent ; but it was contended by the appellant, that the voter's place of abode was not sufficiently described for the purpose of being identified ; for that the words in the second column, namely, "the Grove, Neasdon, in this parish," did not specify any particular parish. The barrister was of opinion that the words "in this parish" must mean "in the parish of Willesden ;" and he overruled the objection.

In the register aforesaid the list of voters in respect of property situate within the parish of Willesden is immediately preceded by a heading in the words "Parish of Willesden ;" and the same words "Parish of Willesden" stand as a heading to every subsequent page in which voters in respect of property within that parish are described.

It was also contended by the appellant, that the property in question was not sufficiently described for the purpose of being identified, and that the name either of the property or of the occupying tenant, ought to have been given in the fourth column.

It was shown that Neasdon was not a street, lane, or like place, and that the property was not situate in any street, lane, or like place, but was known by the name of "The Grove, Neasdon."

The revising barrister was of opinion that the words "house and land, as occupier," in the third column, together with the word "Neasdon" in the fourth column, amounted to a sufficient description of the property ; and he overruled the objection, and retained the name, with 20*s.* costs.

*17] If the court of Common Pleas shall be of opinion *either that the words "in this parish," in the second column of the register, do not necessarily mean "in the parish of Willesden," or that the property, as above described, was not sufficiently described for the purpose of being identified, then the notice is to be expunged : but, if the court of Common Pleas shall agree with the revising barrister on both of these points, then the name is to be retained.

Cockburn, (with whom were *Kinglake*, Serjt., and *H. T. Atkinson*,) for the appellant.(a) The qualifying property is not sufficiently described for the purpose of being identified. The description should have been

(a) The first objection was abandoned as untenable.

"The Grove, Neasdon," the name by which it is known, according to the directions contained in schedule (A), Nos. 2 and 3, to the 6 & 7 Vict. c. 18, ss. 4, 5. In *Eckersley*, app., *Barker*, resp., 7 M. & G. 76, 8 Scott, N. R. 899, TINDAL, C. J., in giving the opinion of the court, says: "The direction at the head of the form No. 2, appears to us to intend, that, if a house be in a street, lane, or other like place in the parish, the street or lane shall be mentioned; and that, if the houses be numbered, the number also shall be given; but that, if the house and premises be not in a street or lane, or other like place, but are in a road, or on a common, or the like, then the name of the property shall be given, if known by any, or the name of the occupying tenant."

Arnold, for the respondent. The description is sufficient. [MAULE, J. The case is somewhat defective, in not stating what Neasdon is. It may be that it is a place consisting only of the house and land occupied by the voter. *Cockburn*. That defect may be supplied. But, whatever Neasdon may be, at all events the name of *the qualifying [*18 property is "The Grove."] By the third section of the 6 & 7 Vict. c. 18, the clerk of the peace is required to cause certain forms of precepts, notices, and lists to be printed and delivered to the overseers; and by section 4, the overseers are required to call upon all persons entitled to vote, whose names are not on the register, or who do not retain the same qualification or continue in the same place of abode as described in the register, to send in their claims. Now, it does not appear, upon the face of this case, that the name of Hall was inserted in the list in consequence of any claim made by him: on the contrary, the case rather shows that he was already on the register. The sixth section enacts, "that the list of claimants (if any) so to be made out by the overseers of every parish or township, together with the said copy of the register, with the marginal additions respectively as aforesaid, (in sect. 5,) for the time being, relating to the same parish or township, shall be deemed to be the list of voters of such parish or township for the county within which such parish or township may be situate." It by no means follows that the same particularity is requisite in the list of voters as in the list of claimants. Assuming, however, that this was a claim, all the requisites of the act have been sufficiently complied with. The name of the property is given, and also the name of the occupying tenant. [MAULE, J. How does it appear that the party occupies the farm in respect of which he claims?] He is stated to be the occupier, and his place of abode, and the local description of the property, are given. If the name of the occupier be given, it is not necessary to add the name of the property. [TINDAL, C. J. *Non constat* that the voter is the occupier of the property mentioned in the fourth column. ERLE, J. The fortieth section enacts that, "if any person whose name is included in any such list, or his place of abode, or the *nature or description of his qualifica- [*19 tion, shall in the judgment of the revising barrister be insufficiently

described for the purpose of being identified, such barrister shall expunge the name of every such person from such list, unless the matter or matters so omitted or insufficiently described, be supplied to the satisfaction of such barrister before he shall have completed the revision of such list, in which case he shall then and there insert the same in such list." The real question, therefore, is, whether or not the barrister was right in deciding that the qualification of the voter was sufficiently described.] The case, then, resolves itself into a mere question of fact, which the barrister has decided.

Cockburn, in reply. The 6 & 7 Vict. c. 18, shows, (ss. 3, 4, 5, 6,) that the old register is to be taken to be in force with reference to those persons who retain the same qualification, and continue in the same place of abode, as therein described. The duty of the overseers is, to publish that part of the preceding year's register furnished to him by the clerk of the peace, together with a list of new claims. Under the 2 W. 4, c. 45, s. 37, the overseers were to give notice yearly, requiring all persons entitled to vote and not already on the register to send in their claims according to a prescribed form: and by sect. 38, it is enacted, that the overseers shall "make out, or cause to be made out, a list containing the names of all persons who shall be upon the register for the time being as such voters, and also the names of all persons who shall claim as aforesaid to be inserted in such last-mentioned list as such voters; and in every list so to be made by the overseers as aforesaid, the Christian name and surname of every person shall be written at full length, together with *20] the place of his abode, the nature of his qualification, and the local or *other description of such lands or tenements, as the same are respectively set forth in his claim to vote, and the name of the occupying tenant, if stated in such claim." The voter, therefore, must originally have made a claim, which must have contained all that it is contended is required here. *ERLE, J.*, referred to the latter part of the forty-second section of the 2 W. 4, c. 45, and the fortieth section of the 6 & 7 Vict. c. 18.] The power to rectify mistakes and to supply omissions applies only to cases where there has been no objection. [*ERLE, J.* The barrister finds that the description was sufficient.] Putting the third and fourth columns together, he expresses an opinion that they amounted to a sufficient description of the property: but he submits it to the judgment of the court whether or not he is right in his conclusion. The registration act expressly requires that the property shall be described by its name, if it is known by a name; and it is extremely important that full and accurate information should be given. [*MAULE, J.* You do not object to the claim.] The objector has nothing to do with the *claim*. The whole process of revision deals with the *list*, which is all the objector sees. It must be presumed that the overseers have done their duty, and made the list in conformity with the claim.

TINDAL, C. J. This appears to me to be a question of fact for the

determination of the revising barrister,—whether there was sufficient on the register to identify the property. This is not the case of an objection to the claim sent in by the party, nor is it an objection to the overseer's list; in either of which cases the question would have been, whether the description of the property inserted in the fourth column of the forms given in schedule (A), Nos. 2 and 3, was a sufficient compliance with the act. But here, the objection arose *before the revising barrister [*21 on the register. He has before him so much of the old register as the clerk of the peace has furnished to the overseers; and he has, in addition, the list of new claims sent in by the parties themselves. We must look at the fortieth section of the 6 & 7 Vict. c. 18, and see whether the objection can apply to the course then taken. That section enacts, "that the revising barrister shall correct any mistake which shall be proved to him to have been made in any list," that is, any slight and unimportant blunder, by which no person could have been misled, and by the correction of which no person could be prejudiced: it then goes on, "and shall expunge the name of every person whose qualification, as stated in any list, shall be insufficient in law to entitle such person to vote;" and that is the main and important object of the inquiry before him: then, after directing that the barrister shall also expunge from the list the name of any person who shall be proved to him to be dead, the clause proceeds—"and wherever the Christian name, or the place of abode, or the nature of the qualification, or the local or other description of the property of any person who shall be included in any such list, and the name of the occupying tenant thereof, shall be wholly omitted, in any case where the same is by this act directed to be specified therein, or if any person whose name is included in any such list, or his place of abode, or the nature or description of his qualification, shall, in the judgment of the revising barrister, be insufficiently described for the purpose of being identified, such barrister shall expunge the name of every such person from such list;" leaving it, therefore, as a question for the barrister, whether the particulars of description are or are not sufficient for the identification of the party or the qualification. And even if he finds the description insufficient, he is not absolutely bound to expunge the name of the party from the list, *but only "unless the matter or matters [*22 so omitted or insufficiently described be supplied to the satisfaction of such barrister before he shall have completed the revision of such list, in which case he shall then and there insert the same in such list." Then, after providing "that, whether any person shall be objected to or not, no evidence shall be given of any other qualification than that which is described in the list of voters or claim, as the case may be, nor shall the barrister be at liberty to change the description of the qualification as it appears in the list, except for the purpose of more clearly and accurately defining the same," the clause goes on to enact, that, "where the name of any person inserted in any list of voters shall have been objected

to by the overseers, or by any other person, and such other person so objecting shall appear by himself, or by some one on his behalf, in support of such objection, and shall prove that he gave the notice or notices respectively required by this act to be given by him, every such barrister shall then require it to be proved that the person so objected to was entitled, on the last day of July then next preceding, to have his name inserted in the list of voters in respect of the qualification described in such list; and in case the same shall not be proved to the satisfaction of such barrister, or in case it shall be proved that such person was then incapacitated by any law or statute from voting in the election of members to serve in parliament, such barrister shall expunge the name of every such person from the said lists." That leaves it altogether as a question of fact for the determination of the barrister whether the nature or description of the qualification is, in his judgment, sufficiently described for the purpose of being identified. In this case it was contended before the revising barrister, on behalf of the appellant, that the premises were not sufficiently described for the purpose of identification. He, however, says, he thought the description sufficient. When, therefore, the party appeals to us, and we can see no reason, upon the evidence that was before the barrister, for saying that the conclusion he came to is wrong, we must affirm his decision.

COLTMAN, J. It also appears to me that the decision of the revising barrister ought to be affirmed. The question before him seems to have arisen upon the construction of the fortieth section of the 6 & 7 Vict. c. 18, viz., whether, under the circumstances, he was justified in finding that the property was sufficiently described for the purpose of identification; and that is the substantial point he has reserved for our decision. The matter is one that is by the act itself expressly referred to the barrister. If he has formed a judgment upon it, it seems to me that his decision is conclusive, and that we are not authorized to look further. At all events, there is nothing in this case that necessarily shows us that the barrister has come to a wrong conclusion.

MAULE, J. I also think that this is not a question of the description that parties aggrieved by, or dissatisfied with, the decision of the revising barrister, are, by sect. 42 of the 6 & 7 Vict. c. 18, enabled to bring before this court by way of appeal. The decision of the barrister is, that, in his judgment, the description of the property was sufficient for its identification. That can only be decided as a question of fact. The only way in which it can be put as a question of law, is, that by no possibility, and under no circumstances, could "Neasdon" be a good description. But, how can we, with the facts that are now before us, say that the description is insufficient? "Oxford Street," which we all know to be almost two miles long, undoubtedly would not do: but

*24] "Oxford court," if it were shown to contain but one house, would

do. The legislature clearly intended that the revising barrister should be a judge without appeal upon questions of fact only.

ERLE, J. I also am of opinion that the decision of the revising barrister in this case must be affirmed. Throughout the act there is no specific requirement that the name of the property should be in the old register. I say that, because the question before us arises under the first part of the fortieth section. The barrister, of his own head, or on any objection, is to hold an inquiry as to the sufficiency of the qualification as stated in the list; and, when those questions are disposed of, he is to go into the real question of qualification. The clause goes on to provide, that, "wherever the Christian name, or the place of abode, or the nature of the qualification, or the local or other description of the property of any person who shall be included in any such list, and the name of the occupying tenant thereof, shall be wholly omitted in any case where the same is by this act directed to be specified therein, or if any person whose name is included in any such list, or his place of abode, or the nature or description of his qualification, shall in the judgment of the revising barrister be insufficiently described for the purpose of being identified, such barrister shall expunge the name of every such person from such list." On the part of the appellant it was contended before the revising barrister that the property was not sufficiently described for the purpose of its identification. The barrister says that, in his judgment, it was sufficiently described: and that question is referred to us. The revising barrister having found that issue in the affirmative, we cannot interfere.

Decision affirmed, without costs

*CITY OF LINCOLN.

[*25

JAMES HITCHINS, Appellant, THOMAS BROWN, Respondent. Nov. 20.

In a notice of claim to be inserted in a list of voters for a city or borough, pursuant to the 6 & 7 Vict. c. 18, s. 15, sched. (B) No. 6, it is enough to describe the *nature of the qualification* in the third column of the form as "house," notwithstanding the qualification in reality consists in the occupation of two houses in immediate succession, provided the whole qualification is accurately described in the fourth column.

And *semble*, that, at all events, the misdescription, if any, is amendable under s. 40.

WILLIAM UPTON appeared to have given due notice of his claim to have his name inserted in the list of persons entitled to vote in respect of property occupied within the parish of St. Peter-at-Arches. The notice of his claim was as follows:—

"Notice of claim.

"To the overseers of the parish of St. Peter-at-Arches, in the city of Lincoln.

"I hereby give you notice that I claim to have my name inserted in

the list made by you of persons entitled to vote in the election of members for the city of Lincoln; and that the particulars of my qualification and place of abode are stated in the columns below. Dated the 23d day of August, 1845 :—

Christian Name and Surname of the Claimant, at full length.	Place of Abode.	Nature of Qualification.	Street, Lane, &c., where the Property is situate, &c., where the Right depends on Property.
William Upton.	Muck Lane, Saint Peter-at-Arches, Lincoln.	House.	No. 5½, Muck Lane, St. Peter-at-Arches, Lincoln; and previously in the occupation of a house No. 21, St. Mary St., in the parish of St. Mary le Wigford, Lincoln. "William Upton."

*26] He proved that he had occupied the two houses described in the fourth column of his claim, in immediate succession, and had done all the things required by law to entitle him to have his name inserted. The insertion of his name was duly objected to by James Hitchins, a registered voter for the said city, on the ground that the nature of his qualification was insufficiently described for the purpose of being identified. On behalf of William Upton it was argued—first, that this description was sufficient—secondly, that, if not, the revising barrister had power to correct the same.

The barrister decided that the nature of the qualification was not sufficiently described for the purpose of being identified; but at his request, he altered the statement as follows :—

Christian Name and Surname.	Place of Abode.	Nature of Qualification.	Street, &c., where Property situate, &c.
William Upton.	Muck Lane, Saint Peter-at-Arches, Lincoln.	Houses occupied in immediate succession.	21, St. Mary Street, St. Mary le Wigford, and 5½, Muck Lane, St. Peter-at-Arches.

and inserted his name, with such alterations, in the list.

The claims of ten other persons whose right to have their names inserted in the list depended upon the same state of facts, were consolidated with the principal case.

Manning, Serjt., for the appellant. The qualification was improperly described in the third column, as it originally stood; and the misdescription was one that the revising barrister had no power, under the act, to
 *27] correct. In *Bartlett*, app., *Gibbs*, resp., 5 M. & G. 81, 7 Scott, N. R. 609, the description was *precisely the same as occurs here;

and it was held insufficient and unamendable. [TINDAL, C. J. The two cases are not identical. This is the case of an objection to the *claim*; in *Bartlett*, app., *Gibbs*, resp., the objection was to the description as it appeared on the list of voters; besides, here, the fact of the successive occupations appears in the fourth column, whereas there it was nowhere noticed.] The first distinction pointed out makes the present objection stronger; for, here, the mistake is by the voter himself: and the second makes no substantial difference; the act requires that the nature of the qualification be truly stated under the proper head. Any person looking at the third column, and knowing that the qualification there stated was not the true one, was not bound to look elsewhere to see if the misdescription was aided by any other part of the paper. If the mistake is to be helped out by the fourth column, why might not the claimant pray in aid a note sent to the overseers at the same time with the claim? [ERLE, J. Resort must be had to the fourth column to ascertain the *locality* of the qualification.] The *nature* of the qualification is to be looked for in the *third* column; and it is no answer that the additional trouble to a party who is inquiring into one vote only, is inconsiderable. The question is, whether the requirements, of the act are to be complied with, or whether the party may substitute something which may or may not convey an equal amount of information. [TINDAL, C. J. The most you can insist on is, that "house" should have been "houses."] That would not be enough: it should have been "houses occupied in succession," as was held in *Bartlett*, app., *Gibbs*, resp. A party might occupy two houses, each of the value of 10*l.*, simultaneously; a good qualification, but totally different from that now set up. By the 6 & 7 Vict. c. 18, s. 40, the barrister is empowered in certain cases to amend mistakes, "provided always, that, whether any person shall be objected to or not, no evidence shall be given of any other qualification than [28 that which is described in the list of voters or claim, as the case may be, nor shall the barrister be at liberty to change the description of the qualification as it appears in the list, except for the purpose of more clearly and accurately defining the same." The matter here in question is clearly within the prohibitory part of that section. The barrister may correct mistake and misdescriptions in the fourth column; but to the third column the prohibition applies. It is only upon that principle that the case of *Bartlett*, app., *Gibbs*, resp., can be supported.

Clarke, Serjt., *contra*, was stopped by the court.

TINDAL, C. J. It appears to me that the description of the qualification in this case was perfectly correct as it originally stood, and complied with all that the act requires. The question turns upon the fifteenth section of the 6 & 7 Vict. 18, and also on the schedule (B), No. 6. Section 15 enacts, "that every person whose name shall have been omitted in any list of voters for any city or borough so to be made out as aforesaid, and who shall claim as having been entitled on the last day of July then next

preceding to have his name inserted therein, and every person desirous of being registered for a different qualification than that for which his name appears in the said list, shall, on or before the 25th of August in that year, give or cause to be given a notice, according to the form numbered (6), in the said schedule (B), or to the like effect, to the overseers of that parish or township in the list whereof he shall claim to have his name inserted; or, if he shall claim as a freeman of any city or borough, or place sharing in the election therewith, then he shall, in like manner, *give or cause to be given to the town-clerk of such city, *29] borough, or place, according to the form numbered 7, in the said schedule (B), or to the like effect; and the overseers and town-clerks respectively shall include the names of all persons so claiming as aforesaid in lists, according to the forms numbered 8 and 9, respectively in the said schedule (B)." The third column of the form No. 6, referred to, is headed "Nature of qualification," and is intended to denote the general character of the qualification; and the fourth column is a mere exposition of the third, as appears from the heading—"Street, lane, or other place in the parish; or township, where the property is situate, and number of the house (if any). [*When the right depends on property.*]" Evidently showing, by the words in italics, that this is a list of persons claiming to be entitled to vote in respect of property, and that the whole application of the fourth column is where the right depends on property, as contradistinguished from the claims to vote as freemen or in respect of reserved rights. I therefore think the third column is satisfied by showing a "house" qualification, and the fourth, by showing an occupation of two houses in immediate succession. One cannot suppose that the third column was intended to be as precise and explicit as the fourth; otherwise the fourth would have been unnecessary. In the case of *Bartlett*, app., *Gibbs*, resp., the right of voting depended on the successive occupation of two houses; and the fourth column did not really describe the qualification of the voter so as to be susceptible of identification. It seems to me that that case was rightly decided, and that this case also will be well decided by holding that the directions of the act have been sufficiently complied with in the framing of this notice.

COLTMAN, J. I am of the same opinion. This case is distinguishable *30] from *Bartlett*, app., *Gibbs*, resp. *There the substantial qualification of the voter was not set out in the list: his real qualification was; the occupation of two houses in succession; whereas the qualification set out was, the occupation of one house only. I therefore think the claim in this case was sufficient as it originally stood. I also think the revising barrister was well warranted in amending the description, and that this is precisely the sort of case that the fortieth section contemplated. The barrister is prohibited from changing the qualification, except for the purpose of more clearly and accurately defining the

same. Here, the qualification remains substantially the same as before the amendment; only it is a little more clearly and accurately defined.

MAULE, J. I have not heard the whole of the argument; but, so far as I have heard it, I see no reason to doubt the correctness of the conclusion at which the rest of the court have arrived.

ERLE, J. I also think the barrister has done right in making the amendment. The description of the qualification as it originally stood was, I think, sufficient. The nature of the qualification is "house," and it is that description of house qualification that is mentioned in the 2 W. 4, c. 45, s. 28, viz., different premises occupied in immediate succession. It is to the fourth column that parties are referred for a more strict and accurate description of the property. In *Bartlett, app., Gibbs, resp.*, the qualification was insufficiently described: it was described as situate in "East Street;" but, when the parties came before the barrister, it was found the qualification consisted of the occupation of two houses in immediate succession, and not merely of a house situate in "East Street."

Decision affirmed, with costs.

*COUNTY OF NOTTINGHAM, NORTHERN DIVISION.

[*31

JAMES ASHMORE, Appellant, FREDERIC LEES, Respondent.
Nov. 20.

The inmates of an hospital in the county of York, founded and endowed by the duke of N. in 1673, claimed to be registered for the county of Nottingham.

It appeared that the revenues of the hospital were derived from lands, and corn-rents in lieu of tithes of lands, in Yorkshire and Nottinghamshire, which were vested in trustees; that the whole formed one fund, out of which the trustees paid a weekly stipend to each inmate; that, originally, each inmate received 2s. 6d. a week, and a certain yearly allowance of coals and clothing; but that the weekly payment had subsequently been increased to 10s.; that, by one of the constitutions of the charity, it was provided, that, if at the end of any year there should be found in the treasury of the hospital above 100*l.*, the surplus should be divided amongst the pensioners; and that the appointment was for life, no instance of dismissal being known.

By an act of parliament modifying the constitutions of the charity, it was provided, that, instead of having the surplus revenues distributable amongst the original number of pensioners, additional pensioners should be chosen; and the trustees, under the direction of the duke, were empowered and directed, from time to time, to add as many more pensioners as the revenues of the hospital would allow, (leaving a sufficient surplus for repairs and incidental expenses;) and the trustees were, under the directions of the duke, to pay the pensioners *such fixed stipends as they should think fit*, (having regard to the revenues of the hospital,) and to lessen or increase, vary, change, and alter such weekly stipends, as they should find requisite, so that the stipends should at no time be reduced below 3s. 6d. a week.

The revising barrister having held that the inmates had no legal or equitable interest in the funds of the hospital to a sufficient amount to entitle them to be registered, assuming that they had no absolute right to more than 3s. 6d. per week, the court affirmed his decision. And held, that the rents derived from the lands in the two counties might be apportioned.

THE right of James Ashmore to have his name inserted in the list of voters for the parish of Harworth, in the northern division of the county of Nottingham, was objected to, and the notices duly proved. His name, place of abode, and nature of qualification, appeared in the list as follows:—

Christian Name and Surname of the Voter.	Place of Abode.	Nature of Qualification.	Street, &c., where Property situate, &c.
Ashmore James.	Shrewsbury Hospital, Sheffield.	Freehold interest in lands, buildings, corn-rents in lieu of tithes.	Harworth and Styrrup.

James Ashmore was an inmate of the Shrewsbury Hospital, Sheffield, in the county of York, and claimed to be a voter for the northern division of Nottinghamshire, as being entitled, as such inmate, to an equitable life-estate or interest in lands and corn-rents in lieu of tithes, arising from lands in the parish of Harworth and the adjoining township of Styrrup.

The Shrewsbury Hospital was founded in pursuance of the will of Gilbert, Earl of Shrewsbury, by Henry, Duke of Norfolk, in or about the year 1673, when he erected the hospital at Sheffield, and made certain statutes and constitutions for its government: and in the year 1680, by indenture, the said duke, in pursuance of the will of the said Earl of Shrewsbury, conveyed certain lands and tenements to trustees for the purpose of maintaining the hospital, and paying the inmates and pensioners according to the said constitutions. The hospital has been further regulated by certain private acts of parliament respectively passed in the 11 G. 1, the 10 G. 3, and in the 4 G. 4, confirming the foundation of the said hospital and the constitutions thereof, subject to certain changes and modifications duly introduced by and in pursuance of the said statutes.

There are now twenty male inmates of the said hospital, of whom the said James Ashmore is one; and, as such inmates, they occupy and enjoy certain rooms and premises at Sheffield, in the county of York; but
 *33] they are not in the occupation of any property in the county of Nottingham.

By the said constitutions it is (amongst other things) ordained, that, in the said hospital, there shall be, for ever, one governor and twenty poor persons, who shall give themselves to the service of God, and to pray for the prosperity of the noble family of the founder and his posterity; and that the said governor and every of them shall enjoy such chambers, rooms, and accommodations, from time to time, for their lives, together with such stipend and all other allowances as are thereafter to every of them limited and appointed, every of them well and honestly behaving himself, according to the said statutes and constitutions.

It was also provided by the said constitutions, that the said Duke of Norfolk, and his heirs, should from time to time nominate the governor, and certain persons who were to be assistants to the governor in the disposal of the revenues of the said hospital: and they were to receive the rents from the collector and lay them up in the treasury of the hospital: and one or more of them were to meet monthly with the governor in the hall, and pay the said inmates their allowance (as thereafter limited and

appointed) out of the moneys in the treasure house, that is to say, 2s. 6d. a week for each inmate, (which sum has since been considerably increased under the powers given by the said acts of parliament,) and also to every one in due season, two wain-loads of pit coals for one whole year's firing. And the assistants aforesaid were also from time to time to advise and assist the governor in buying such clothing in such manner as thereafter directed, that is to say, to every man a purple gown in seven years, for festival days, and a blue one every two years, to be clothed withal.

It was also further provided by the said constitutions, *that a register should be kept of all the members of the hospital after [34 their regular election; and that the poor men should be widowers or bachelors, and three-score years of age or upwards, unless they should be particularly dispensed with by said duke or his heirs; and that, for electing them, the said governor and three assistants, or the major part, should, on the death or removal of every poor person, present the names of two persons for every void place to the said duke, or his heirs, to the end that the said duke, or his heirs, might elect one or more to the vacant place or places; and that if the duke, or his heirs, should neglect to choose within six weeks, the governors and assistants, or the majority, were then to fill up the vacancy or vacancies: provided that the said founder, or his heirs, might, if he or they thought fit, make choice of a poor person qualified according to the statutes, without any certificate from the governor and assistants.

It was further provided by the said constitutions, that the persons to be elected should be chosen from Sheffield, if fit persons were to be found therein, the poor tenants of the founder and his heirs to have the preference: and, if proper persons could not be found in Sheffield, the said duke, or his heirs, might choose persons qualified according to the statutes in any place where the duke, or his heirs, had lands descended to him from the said Gilbert, Earl of Shrewsbury.

The persons to be elected were to be poor indigent people, well esteemed of for godly life and conversation, and of good condition, and peaceable and quiet amongst their neighbours, and such as by persons of honest repute should be judged fit objects of the charity: but, if it should so happen, by misinformation or mistake, that any person should be elected wanting such qualifications as are in the statutes required, or should *afterwards marry or in anywise misbehave themselves, contrary to [35 the said rules and constitutions, that then every such poor person should be removed and expelled by the governor and assistants for the time being, or the major part, and another chosen in his place.

It was further provided by the said constitutions, that the said poor persons were to employ themselves in some work and labour according to their abilities; that no one was to lodge with any of the said poor persons, or be admitted to inhabit in their rooms, without license as therein mentioned; and that none of the said poor persons should lodge abroad, wander, or beg alms, upon pain of expulsion.

It was also ordained that the gowns belonging to the poor persons should, on their deaths, go to their successors; and that, on the year when they had no gowns, two shirts should be provided for the men.

It was also provided, that, if the said poor persons should profanely curse or swear, or frequent taverns or ale-houses, or remain there above an hour in a day, or be drunk, or any otherwise misbehave themselves, the governor and assistants might, for a first, second, and third offence, impose certain specified fines, to be stopped out of their weekly allowances; and that, if the said offender should be incorrigible, and should not reform his life, then the offender should be expelled: provided that the governor and assistants, and the duke, or his heirs, might afterwards, at their pleasure, restore the person so expelled.

It was also ordained that what moneys should, at the end of every year, remain over the necessary disbursements thereby authorized, should be put into the common treasury; and, whenever it should be found that there remained in the treasury (all necessary charges being defrayed) above 100*l.*, that then all such surplus money exceeding 100*l.* should be *36] equally distributed *amongst the poor persons according to the proportion of their allowance.

Certain other particular regulations were made by the said constitutions; but they are not material to the present case. No power of expulsion was given, except those which are above set out.

It was further ordained that the said duke, and his heirs, any thing therein contained to the contrary notwithstanding, did reserve a power to himself and his heirs, for ever, to alter, dispense with, or repeal, at his or their wills or pleasures, any of the said statutes, constitutions, and ordinances, and to add such new ones, from time to time, as he or they in their wisdom should think fit, for the better government of the said hospital: provided always that neither the said duke nor his heirs should divert or diminish any part of the 200*l.* clear yearly revenue which was the minimum amount originally appointed by the will of the said Earl of Shrewsbury for the maintenance of the said hospital, when he directed the same to be founded.

The hospital, as it now exists, is governed by the said constitutions, as modified by the said private acts of parliament. The material enactments of the said acts of parliament, with reference to the present case, are, that, instead of having the surplus revenues distributable amongst the original number of pensioners, additional pensioners were directed to be chosen; and the trustees, under the direction of the duke, were empowered and directed, from time to time, to add as many more pensioners as the revenues of the hospital would allow, (leaving a sufficient surplus for repairs and incidental expenses;) and the trustees were, under the directions of the duke, to pay to the pensioners such fixed stipends as they should think fit, (having regard to the revenues of the hospital,) and to lessen or increase, vary, change, and alter such weekly stipends, as

*they should find requisite, so that the stipends should at no time be reduced below 3s. 6d. a week. [*37]

The hospital *was never incorporated*; and the estates from which its revenues arise have always been, and are now, vested in trustees, who hold the said estates in trust to apply the revenues for the purpose of keeping the hospital in repair, and paying the pensioners their stipends and allowances of coals and clothing, and also paying the governor's salary, and other incidental expenses of the establishment, according to the constitutions, as modified by the acts of parliament. The trustees have no beneficial interest in any part of the property. Upon a trustee dying, the Duke of Norfolk and his heirs, or, in his default, the surviving trustees, nominate a new trustee.

The revenues of the hospital arise entirely from real property, which is partly in Yorkshire, and partly in Nottinghamshire. The Yorkshire property forms nearly two-thirds of the whole in value; and the remaining property is in, or arises from Harworth and Styrrup, as described in the list. Such residue consists partly of land belonging to the hospital, and partly of corn-rents in lieu of tithe, arising from land belonging to other parties. The revenues from the different estates of the hospital form one general fund, out of which the expenses of the establishment, and the allowances of the pensioners, are paid, without any distinction as to the Yorkshire or Nottinghamshire property.

According to the ordinary usage of the hospital, the pensioners, when chosen, enjoy the benefits of the institution as long as they live. No instance of dismissal appears to be known.

James Ashmore, the person named in the list, was duly appointed an inmate of the said hospital, and, as such inmate, he receives a fixed stipend of 10s. per week, and, also, the allowance of coals and clothing, *according to the constitutions; but neither he, nor any pensioner, receives any thing beyond the said fixed weekly stipend and allowance. [*38]

If this weekly sum and the average annual value of his allowance for coals and clothing, are to be added together, and are to be considered as arising from the whole of the real estates of the hospital, and to be apportionable between the two counties of Yorkshire and Nottinghamshire, according to the relative values of the estates in each, the amount of the proportion to be so considered as arising from Nottinghamshire would be of sufficient value to entitle him to be placed on the register, provided his interest were, in other respects, sufficient; but, if the value of the coals and clothing is not to be taken into account, then the proportion of the money stipend alone would be insufficient. The original stipend of 2s. 6d. per week, and the subsequently fixed minimum of 3s. 6d. per week, would be quite insufficient, in any case; and, if the land and corn-rents in Nottinghamshire are not to be added together in estimating the total value of the Nottinghamshire property, as described in the list, the value would, in no case, be sufficient.

On the part of the objector, it was contended before the revising barrister:—

1. That James Ashmore had not a life-interest in the emoluments he enjoyed by virtue of his appointment as an in-pensioner of the hospital:

2. That, if he had a life-interest in such emoluments, it was not proved that he had any legal or equitable estate in lands or tenements in the county of Nottingham; as the whole real estates were in two different counties, and James Ashmore was not entitled to require payment of his stipend or allowances, or any part of them, out of the Nottinghamshire property in particular, but that this was a matter in the discretion of the trustees:

*39] 3. That, even if he had an equitable estate in the *Nottinghamshire property, yet, as that property consisted partly of lands and partly of corn-rents arising from lands not belonging to the hospital, these two different descriptions of property could not be joined to make up the requisite value for the franchise, each of them being, singly, insufficient for the purpose:

4. That the right to receive, as an inmate of the hospital, the said weekly stipend, and the said allowances of coals and clothing, (according to the said constitutions and acts of parliament,) did not constitute a sufficient equitable estate or interest in the real property out of the rents and profits of which such allowances were made, to entitle James Ashmore to be placed on the register; and that, at all events, the value of the allowances for coals and clothing could not be taken into account, to make up the requisite value.

The revising barrister decided in favour of the objector upon the second and fourth grounds, and expunged the name from the register, subject to the present case.

The constitutions and the several acts of parliament relating to the hospital are to be read or referred to as part of the case, if necessary.

The like objections applied to the names of sixteen other persons on the list of the parish of Harworth, whose cases are consolidated with the principal case.

Mellor, for the appellant. Ashmore and the other inmates of this hospital, whether they had or had not a freehold estate in the lands belonging thereto, at all events had a life-interest in the emoluments enjoyed by them. *Simpson*, app., *Wilkinson*, resp., 7 M. & G. 50, 8 Scott, N. R. 814. [MAULE, J. The first and third objections having been disallowed by

*40] the revising barrister, and there being no appeal *against his decision thereon, those points are not now open to discussion: we are only authorized by the 6 & 7 Vict. c. 18, s. 42, to enter into such questions of law as are reserved by the barrister for our opinion.] The second objection was, that, if the claimant had a life-interest in such emoluments, it was not proved that he had any legal or equitable estate in lands or tenements in the county of Nottingham, as the whole real estates were in

two different counties, and he was not entitled to require payment of his stipend or allowances, or any part of them, out of the Nottinghamshire property in particular; that was a matter in the discretion of the trustees. The revising barrister found that the qualification was sufficient, if the weekly sum and the average annual value of the allowance for coals and clothing were to be added together, and were to be considered as arising from the whole of the real estates of the hospital, and to be apportionable between the two counties of Yorkshire and Nottinghamshire, according to the relative values of the estates in each. The payments are to be made out of the general fund. [MAULE, J. It is found that each inmate is, in a certain sense, in the enjoyment of 10*l.* a year, arising out of lands situated two-thirds in Yorkshire and one-third in Nottinghamshire.] In the case of a mortgage upon an estate or estates situate in two counties, the value may be apportioned. *Long v. Short*, Elliott on Elections, 2d edit. p. 84. The fourth objection was, that the right to receive, as an inmate of the hospital, the weekly stipend and the allowance of coals and clothing, (according to the constitutions and acts of parliament,) did not constitute a sufficient equitable estate or interest in the real property out of the rents and profits of which such allowances were made, to entitle inmates to be placed on the register; and that, at all events, the value of the allowances for coals and clothing could not be taken into [*41 account, to make up the requisite value. It does not appear from the case, upon which of two grounds it was that the barrister decided in favour of this objection. As to the second, it is unnecessary to say much: the value of the party's interest is the same, whether he receives money or money's worth; both are equally furnished out of the rents of the estates. The decision of the revising barrister is evidently founded upon the assumed arbitrary discretion in the trustees to raise or to diminish the amount of the weekly stipend. Their power is, however, controlled by the statute 10 Geo. 3, referred to in the case. Can it be said, that the discretion so given to the trustees is an arbitrary one? In *Davis*, appellant, *Waddington*, respondent, 7 M. & G. 37, 8 Scott, N. R. 807, the trustees were empowered, by the letters-patent of incorporation, to appoint and remove the inmates "*toties quoties sibi, aut eorum numero majori, conveniens fore videbitur*:" there was nothing in the charter or the by-laws to limit their arbitrary discretion. Here, however, the discretion of the trustees is fettered in many respects, depending upon the state of the revenues of the hospital and the claims thereon. The stipends once fixed agreeably to the constitutions and the acts of parliament for the regulation of the hospital, the presumption is, that the trustees will not, and indeed, without the assent of the court of Chancery, they cannot alter them.

Byles, Serjt., for the respondent. As to the second ground of objection, it may be conceded, that no very satisfactory answer can be given as to the apportionment. Upon the fourth objection, however, the decision of the barrister was clearly right. The foundation of the decision is, that

*42] the voter has no *right*, legal or equitable, *to any thing beyond 3s. 6d. per week, unless the value of the coals and clothing is taken into account; and that this stipend is insufficient, in any view, to entitle the party to be registered. The case finds, that, by the constitutions and acts of parliament by which the hospital is governed, instead of having the surplus revenues distributable amongst the original number of pensioners, additional pensioners were directed to be chosen, and the trustees, under the direction of the duke, were empowered and directed, from time to time, to add as many more pensioners as the revenues of the hospital would allow, (leaving a sufficient surplus for repairs and incidental expenses;) and the trustees were, under the directions of the duke, to pay to the pensioners such fixed stipends as they should think fit, (having regard to the revenues of the hospital, and to lessen or increase, vary, change, and alter such weekly stipends as they should find requisite, so that the stipends should, at no time, be reduced below 3s. 6d. a week. [MAULE, J. It may be, that the trustees have now reduced the weekly stipend to the *minimum*.] It rests altogether upon the discretion of the duke and the trustees. [TINDAL, C. J. It does not appear on the case, that the voter was not elected before the passing of the reform act: if he was, an equitable interest of the value of 40s. by the year would suffice.] From the whole of the case, it may fairly be assumed that the election took place since the passing of the reform act. [To this *Mellor* assented.]

Mellor, in reply. [ERLE, J. What equitable estate have the inmates in the lands belonging to this hospital?] The lands are vested in trustees, on trust, to receive the rents and pay the allowances. The seventy-fourth section of the 6 & 7 Vict. c. 18, makes provisions for parties receiving rents *43] and profits through the hands of *trustees. [ERLE, J. If the trustees would be accountable in Chancery to each pensioner, my objection is answered.] Any one pensioner, it is submitted, might enforce the payment of his stipend, by application to the court of Chancery. [MAULE, J. *Simpson*, appellant, *Wilkinson*, respondent, 7 M. & G. 50, 8 Scott, N. R. 814, was a case of an equitable interest.] In *Baxter*, app., *Brown*, resp., 7 M. & G. 198, (a) also, the parties claimed only an equitable interest. The parties here have clearly an equitable estate, according to those cases. [ERLE, J. They are entitled to certain weekly payments from a fund arising out of the land, but not to an estate in the land. MAULE, J. The real question is, whether they are entitled to any thing more than 3s. 6d. per week; or, whether, if the trustees had reduced the stipend to that amount, before the parties appeared at the court of revision, they would have been entitled to be registered.] The trustees have no arbitrary and irresponsible power to reduce the stipend; every thing must be done in conformity with the constitutions and the acts of parliament.

TINDAL, C. J. The question before us is reduced to the single inquiry, whether the amount these parties are entitled to receive, is sufficient to

(a) 8. C. per nom. *Baxter*, app., *Newman*, resp., 8 Scott, N. R. 1019.

confer on them a qualification to vote ; and that depends upon whether or not they are entitled, legally or equitably, to a greater sum than 3s. 6d. per week ; for, the case proceeds upon the footing, that, unless the value of the allowance for coals and clothing be taken into the account, the weekly stipend would not be sufficient. Looking at the constitutions and at the acts of parliament by which the affairs of the hospital are regulated, it appears to me to be perfectly clear that each inmate has no legal or *equitable right to more than 3s. 6d. per week. It is found by the [*44 case, that the allowance was originally 2s. 6d. per week, that it was afterwards increased to 3s. 6d., and, subsequently, to 10s. per week. But from the acts of parliament referred to in the case, that, “instead of having the surplus revenues distributable amongst the original number of pensioners, additional pensioners were to be chosen ; and the trustees, under the direction of the duke, were empowered and directed, from time to time, to add as many more pensioners as the revenues of the hospital would allow, (leaving a sufficient surplus for repairs and incidental expenses ;) and the trustees were, under the directions of the duke, to pay to the pensioners such fixed stipends as they should think fit, (having regard to the revenues of the hospital,) and to lessen or increase, vary, change, and alter such weekly stipends, as they should find requisite, so that the stipends should, at no time, be reduced below 3s. 6d. a week.” Coupling that with the power and direction before given to the trustees to increase the number of pensioners, it seems to me to be perfectly clear, that the inmates of this hospital have no right beyond the minimum of 3s. 6d. per week, and that that is not sufficient to entitle them to be placed upon the register.

COLTMAN, J. I am of the same opinion. It is not enough that the party is actually in the receipt of rents and profits to the value of 10*l.* a year : it is necessary, also, that he should have a vested right to that extent. Though it appears, in this case, that each inmate or pensioner of this hospital actually receives 10s. per week, still he is liable, at any time, to have it reduced to 3s. 6d. per week. He has no fixed vested right beyond 3s. 6d. per week. Upon the finding of the barrister, therefore, that is clearly insufficient. I think his decision is right.

*MAULE, J. I also think the decision of the revising barrister [*45 must be affirmed, on the ground that the several claimants have no legal or equitable estate of sufficient value to entitle them to vote. The revising barrister has found that the interest is insufficient, unless the right of the claimants, beyond the sum of 3s. 6d. per week, is such as to constitute a legal or equitable estate. I think it clearly is not : it is liable to be diminished at the discretion of persons over whom he has no control.(a)

ERLE, J. It also appears to me, that all these parties were, of right,

(a) A right to the 10*s.* a week, though defeasible at the will of a stranger, would have been freehold ; 7 M. & G. 46.

entitled to, besides coals and clothing, was 3s. 6d. per week ; and that is not sufficient in value to give them a qualification.

Decision affirmed, without costs.

COUNTY OF GLOUCESTER, EASTERN DIVISION.

HENRY BISHOP, Appellant, RICHARD HELPS, Respondent. *Dec. 23.*

Sending a notice of objection to the party objected to by the post, pursuant to the directions of the 6 & 7 Vict. c. 18, s. 100, is a sufficient substitute for giving the notice to the party, or leaving it at his place of abode, as required by s. 7.

Where, therefore, a notice was posted, under s. 100, in sufficient time to reach the party, according to the ordinary course of post, on the 25th of August : *Held*, that such service was sufficient notwithstanding that the actual delivery was accidentally delayed until the 27th. And, *held*, that the provisions of s. 100 are equally applicable to notices to overseers, directed to their usual places of abode, as provided by s. 101.

HENRY BISHOP objected to the name of John Cooke being retained upon the list of voters for the parish of Corse, in the county of Gloucester.

The objector, who resided at Cheltenham, produced duplicates of notices *46] of objection, in the proper form, to *the voter and overseers of the parish, bearing the Manchester post-mark of the 24th of August, 1845, and proved, that, in the ordinary course of post, those notices would have been delivered at the places to which they were respectively addressed, some time on the following day. The notices were not delivered at those places respectively until the 27th of August, and had the post-mark of the 27th at the places to which they were addressed also impressed upon them. It was contended, on the part of the voter, that the objector had not given the notice required by the statute 6 & 7 Vict. c. 18, s. 7, in due time, either to the voter or the overseers.

The revising barrister retained the name upon the list, and also, upon a similar state of facts, the names of thirteen other persons, whose appeals are consolidated with the principal case.

If the court is of opinion that both the notices were given in due time, as required by the statute, the names are to be expunged ; (a) but, if either of the notices was not so given, then the names are to be retained.

Talfourd, Serjt., for the appellant. (b) This case raises the question, whether a party who complies with the provisions of the 6 & 7 Vict. c. 18, ss. 100, 101, by delivering a notice of objection, open and in duplicate, to the post-master, addressed to the voter, and also to the overseer, so that according to the ordinary course of the post such notices should reach the parties in due time, and produces before the revising barrister the stamped duplicate, has done enough to call upon the voter to prove his

(a) If the notice of objection had been held good, the respondent might have proved a qualification.

(b) The case was argued in Michaelmas term, before Tindal, C. J., and Coltman, Maule, and Erle, Js.

qualification ; or whether, assuming such stamped duplicates to be good *primâ facie* evidence of the service of the notices, it is competent to the voter to *show, that, by reason of some default on the part of the post-office authorities, the notices have failed to reach their destination in due time. The seventh section of the 6 & 7 Vict. c. 18, requires the objector, on or before the 25th of August, to "give or cause to be given" to the overseer a notice in a form prescribed. Section 100 enacts, that "it shall be sufficient," if the notice shall, on or before the 25th of August, be sent by the post free of postage, directed to the person to whom the same shall be sent, at his place of abode as described in the list of voters ; and that, whenever any person shall be desirous of sending any such notice of objection by the post, he shall deliver the same, duly directed, open and in duplicate, to the post-master of any post-office where money orders are received or paid, &c. ; and the post-master shall compare the said notice and the duplicate, and, on being satisfied that they are alike in their address and in their contents, shall forward one of them to its address by the post, and shall return the other to the party bringing the same, duly stamped with the stamp of the said post-office ; and the production by the party who posted such notice of such stamped duplicate, *shall be evidence* of the notice having been given to the person at the place mentioned in such duplicate, on the day on which such notice would in the ordinary course of post have been delivered at such place : provided, that, if no place of abode of the person objected to shall be described in the said list, or if such place of abode shall be situate out of the united kingdom, then it shall be sufficient if notice shall be given to the said overseers, and to the occupying tenant, (if any,) in the case of a county voter, or, in the case of a city or borough voter, to the overseers, or to the town-clerk, or, in the case of a liveryman of the city of London, to the secondaries and clerk of the particular company to which the person objected to shall belong. The 101st section provides, that, [*47
 * "whenever any notice is by this act required to be given or sent to the overseers of any parish or township, *it shall be sufficient* if such notice shall be delivered to any one of such overseers, or shall be left at his place of abode, or at his office or other place for transacting parochial business, or shall be sent by the post, free of postage, or the postage thereof being first paid, addressed to the overseers of the particular parish or township, naming the parish or township, and the county, city, or borough respectively to which the notice to be so sent may relate, without adding any place of abode of such overseers ; and that, wherever by this act any notice is required to be given or sent to any person or persons whatsoever, or public officer, *it shall be sufficient* if such notice be sent by the post in the manner and subject to the regulations hereinbefore provided with respect to sending notices of objection by the post, free of postage, or the postage thereof being first paid, addressed with a *sufficient* direction to the person or persons to whom the same ought to be given or

sent, at his or their usual place of abode.” In the case of a notice of dishonour of a bill of exchange, it is enough, to charge the drawer on the default of the acceptor, to show that a letter containing the notice, duly directed to him, was put into the post. And so in the case of a notice of an act of bankruptcy. (a) The intention of the legislature, in the provision under consideration, was, to simplify the proof before the revising barrister—to give the stamped duplicate an effect beyond what in ordinary cases such an instrument would have; as in the case of newspapers, the production of the stamped copy is evidence of the publication. (b) The object of the proviso in sect. 100, was, to prevent the retention on the *49] register of fictitious names, or “names within fictitious addresses.

The question here is, not whether the act dispenses with proof of the act of posting the notices; for, it may be assumed that the notices were duly posted; but that through some accident they did not reach the hands of the parties for whom they were intended. [TINDAL, C. J. From some cause that is unexplained, the notices did not arrive by the day on which, according to the ordinary course of the post, they should have arrived. ERLE, J. It appears from another case, (c) that the delay arose from the great accumulation of letters at the Manchester post-office on the two or three days preceding.] Are the consequences of that accident to be visited upon the objector? [ERLE, J. The question is, whether the mere posting of the notices, as directed by sect. 100, is sufficient proof of the sending and of the receipt. TINDAL, C. J. It may also be a question whether the provisions of the act do not vary as to the two notices.] It is submitted that the general words in sect. 101, incorporate all the provisions of sect. 100, as to the transmission of the notice and the effect of the stamped duplicate. [MAULE, J. I incline to think that is so.] It is not necessary, however, to decide that question; for, here, *both* notices were duly posted. In *Cooper*, app., *Coates*, resp., 5 M. & G. 98, (d) TINDAL, C. J., in delivering the opinion of the court, anticipates the very circumstance that has given rise to the delay in the delivery of the notices in this case. And in *Cuming*, app., *Toms*, resp., 7 M. & G. 29, 8 Scott, N. R. 827, the same learned judge says: “It appears, when the stamped duplicate is produced before the revising barrister by the proper party, that faith and credit are *50] given to the stamp *affixed at the post-office.” Though not a decision in point, the case shows that the court will put such a construction upon the act as to carry into effect the obvious meaning of the words used. [MAULE, J. The objection is, that the proof on which you seek to rely is proof of something that is confessedly contrary to the fact. Now, the act does allow of this in other cases. If the party to whom the notice is addressed has changed his abode, or is abroad, and the post-office authorities have done all that their duty requires of them in en-

(a) See *Bird v. Bass*, 6 M. & G. 143, 6 Scott, N. R. 928; *Conway v. Nall*, ante, vol. i. 643

(b) See 6 & 7 W. 4, c. 76, s. 8.

(c) *Hickton*, app., *Antrobus*, resp., post, p. 82.

(d) *S. C. per nomen Allen*, app., *Waterhouse*, resp., 8 Scott, N. R. 68.

deavouring to effect a delivery, that will undoubtedly be a sufficient, or rather will be equivalent to, service.] The stamped duplicate is put somewhat upon the footing of a record. General convenience requires that the service of the notices in this case should be held sufficient.

Byles, Serjt., (with whom was *W. R. Grove*,) for the respondent. The decision of the revising barrister was correct. The barrister finds that the *only* evidence of the posting of the notices, was, the production of the stamped duplicates; and in both cases he finds, not that the notice did in fact ever reach the parties, but that it did not arrive at the place to which it was addressed until the 27th of August. The duplicate only is stamped at the place of posting. [ERLE, J. The question of law presented for our decision is this: certain notices which, by the due course of post, would have reached the parties on the 25th of August, did not in fact reach them until the 27th; I, the revising barrister, decide that the notices are too late, and retain the names; if the court thinks my decision wrong, the names are to be expunged from the list. That is the only question we have to deal with.] The barrister reserves two questions for the court—first, whether the notice to the voter was given in time—secondly, whether the notice to the overseers was in time.

*1. As to the notice to the voter: that clearly was not given in due time. In *Elliott on Registration*, 1st edit. p. 271, it is said that [*51 “it had been generally held that it was not sufficient to prove a notice of objection sent by the post to the party, without some proof of its having reached him.” It was to obviate that difficulty that the provision now under consideration was introduced into the statute 6 & 7 Vict. c. 18. The first question arises upon the meaning of the word “sufficient” in the earlier part of the 100th section: it clearly must have reference to the direction of the letter to the place of abode of the voter, as described in the list; and “sent” means actually transmitted, *effectually* sent, to the person to whom it is addressed; the meaning of the word being very much explained by the subsequent provision that the production of the stamped duplicate “shall be evidence of the notice having been *given to the person* at the place mentioned in such duplicate on the day on which such notice would in the ordinary course of post have been delivered at such place.” Then it is said that the stamped duplicate *shall be evidence*—not *conclusive* evidence: and the legislature knew how to express themselves if they had intended it to be conclusive; for, by sect. 79, the register is declared to be “*conclusive* evidence that the persons therein named continue to have the qualifications which are annexed to their names;” and such is the expression used in the 6 & 7 W. 4, c. 76, s. 8, referred to on the part of the appellant. Whether the notice arrives a day or two too late, or fails to arrive at all, therefore, can make no difference: and the case may be argued on the assumption that the notices here never actually reached their destination. Taking it that the non-arrival was the result of accident, upon whom is the inconvenience, if any, to fall? Is it *to [*52

fall upon the objector, who had the choice of two modes of giving notice? or upon the voter, who has no such election? [MAULE, J. The legislature may have thought that no great mischief could result from an accidental delay of a day or two.] This may be likened to the case of a party who, having a remittance to make, has the option of doing it in either of three ways—he may carry it himself, or send it by a servant or agent, or may transmit it by post: if he adopts the latter course, unless at the special request of the payee, and the money fails to reach its destination, he alone must bear the loss. [TINDAL, C. J. Unless such a mode of remittance were authorized by an act of parliament.] Suppose this notice had been sent by post directed to the voter's actual place of abode, and it had never reached him? [MAULE, J. That clearly would not do: there is no provision for that. TINDAL, C. J. The difficulty that is cast upon the objector is, that he could not be aware of the way in which he was to be met, until he appeared before the revising barrister.] A still greater difficulty is imposed upon the voter, if called upon to prove his qualification, when he has received no notice that it is objected to. [MAULE, J. You say that the legislature, as to the evidence, only meant to substitute the stamped duplicate for the original, which it might be difficult to procure?] Precisely so.

2. The notice to the overseers was not duly given. The only proof of notice was, the production of the stamped duplicate. [ERLE, J. You are assuming something contrary to the statement in the case.] It is clear from the case that the notice was not *received* in due time: it may therefore be assumed that it never arrived at all. Section 101 enacts, “that, wherever any notice is by this act required to be given or sent to the overseers of any parish or township, it shall be sufficient if such notice shall be *53] delivered to any one of such *overseers, or shall be left at his place of abode, or at his office, or other place for transacting parochial business, or shall be sent by the post, free of postage, or the postage thereof being first paid, addressed to the overseers of the particular parish or township, naming the parish or township, of the county, city, or borough respectively to which the notice to be so sent may relate, without adding any place of abode of such overseers.” Now, it does not appear upon the case, in what manner the notice in question was addressed. [TINDAL, C. J. We must assume that it was properly addressed; the case finds that both the notices were in the proper form. At all events, if any thing turned upon it, we would remit the case to the revising barrister to state the fact more specifically.(a)] In *Hinton*, app., *The Town Clerk of Wenlock*, resp., 7 M. & G. 166 n., 8 Scott, N. R. 995, it was held that the court will not remit a case for the insertion of a fact, which the barrister considered to be immaterial. This is not a notice within the act at all. [ERLE, J. You are raising a question of fact, upon which the

(a) The barrister, who was in court, stated that the notice was directed “To the overseers of Cheltenham.”

revising barrister has not exercised his judgment. The only objection before him was, that the notices did not reach the hands of the persons to whom they were addressed in due time.] The court must see, upon the face of the case, that the notice was so directed to the overseers, as to let in the first objection. The eighth section, and the form of the precept in schedule (A), No. 1, are material to show what is meant by the word "sent by the post," in sect. 101. That section enacts, "that the overseers shall, in every year, include the names of all persons against whom notice of objection shall have been *given* to them as aforesaid,^(a) *in [*54 that year, in a list, according to the form numbered 6, in the said schedule (A)," &c.: and the precept is as follows:—"You are to make out a list, according to the form numbered 6, containing the name of every person against whom a notice of objection shall have been given to you, or any one of you, on or before the 25th of August," &c. This clearly shows that "sent" means—transmitted in such manner that the notices shall reach their destination.

Talfourd, Serjt., in reply. No analogy can be drawn from the language of the 79th section, which makes the register *conclusive* evidence, not merely of a fact, but of that which is often contrary to the fact, namely, that the voter retains the qualification annexed to his name. Considerable expense was often incurred before election committees in establishing the fact of a change of qualification: and the legislature thought it better, for general convenience, to make the register final and conclusive. The 100th section makes the delivery to the post-master, and the production of the stamped duplicate to the post-master, "sufficient" evidence of the notice having been given to the person at the place mentioned in such duplicate, on the day on which such notice would in the ordinary course of post have been delivered at such place: not evidence of the mere *giving* of the notice, but of its *receipt* also. In *Stocken v. Collin*, 7 M. & W. 515, PARKE, B., said: "If a party puts a notice of dishonour into the post, so that in the due course of delivery it would arrive in time, he has done all that can be required of him; and it is no fault of his that delay occurs in the delivery." [MAULE, J. The law does not require the party to give notice; but to use due diligence to give notice.] Enough is done if the notice *is posted, so that it would, according to the usual [*55 course of the post, arrive in due time. The statute means to give validity to the time as well as to the act of posting. There can be no distinction in this respect between the two notices. And it sufficiently appears upon the case that the notice sent to the overseers was properly addressed. The fact was not disputed before the revising barrister.

Cur. adv. vult.

TINDAL, C. J., now delivered the opinion of the court.

In this case, which was an appeal from the decision of the revising barrister for the eastern division of the county of Gloucester, the question

(a) Section 7.

reserved by him for the opinion of the court was, whether the notices of objection to the party who claimed the right to vote, and to the overseers, were given in due time. The notices were proper in point of form, and were duly delivered to the post-master in such time as that by the ordinary course of the post they would have been delivered at the places to which they were respectively addressed, some time in the day of the 25th of August; (a) but, in point of fact, they were not delivered at such places until after that day: so that the question is limited to the sufficiency of the notices in point of time.

Two questions were raised in the argument before us, one with respect to the notice to the party objected to, the other with respect to the notice to the overseers. We will first consider the case of the notice to the party objected to.

The act 6 & 7 Vict. c. 18, by the 7th section, requires a notice of objection to be delivered on or before the 25th of August. The *56] 100th section enacts, that, in case of notice to a person objected to, it shall be "sufficient" if the notice shall be sent by the post, free of postage, directed to the person to whom it is sent, at his place of abode as described in the list of voters; and that, whenever any person shall be desirous of sending such notice by the post, he shall deliver the same, duly directed, open, and in duplicate, to the post-master of a post-office where money orders are received or paid, within such hours as shall have been given notice of, and under such regulations with respect to the registration of such letters as shall be made by the post-master-general. The act then directs the post-master, on payment of the fee for registration, to compare the notice and duplicate, and to forward one, and to return the other to the party bringing it. It then provides that the production of a stamped duplicate by the party who posted such notice, shall be evidence of the notice having been given to the person mentioned in the duplicate, on the day in which such notice would, by the ordinary course of post, have been delivered to such place.

It was argued, on the part of the respondent, that the true construction of this section was, that it should be sufficient if the notice was *effectually* sent, that is, sent and *delivered*. And there is no doubt that this would be sufficient: but it would, at the same time, be unnecessary to have this provision, which is a very special one, in order to make such a sending sufficient; for, there is no doubt that any sending and delivery, by a servant or otherwise, by which the notice came to the voter, would be sufficient by the ninth section. It is, therefore, evident that some privilege is meant to be conferred by section 100, on a mode of dealing with the notice which is so carefully provided for. The notice must be posted at a select *57] description of office; within certain hours; the postage must be paid; it must be registered, and the fee for registration must be paid; it must be delivered to the post-master, open, and in duplicate;

(a) By sect. 100, it is declared to be sufficient if the notice is *posted on the 25th*.

compared; stamped; and the duplicate returned. And we think the meaning of the act is this—when all these conditions are complied with, such a sending shall be a sufficient substitute for what the seventh section required to be done, that is, a sufficient substitute for giving the notice to the person objected to, or leaving it at his place of abode.

It was probably considered that the public convenience would be promoted by the present provision, and that its advantages would greatly outweigh the inconvenience, which, in some few cases, might possibly arise from it. Indeed, in the case of leaving notices at the place of abode, it may possibly happen, that, without any fault of the party objected to, the notice may be lost or destroyed, or simply not delivered, through the negligence of a servant, and so never come to his knowledge; and yet there can be no doubt *this* would be a sufficient delivery. And perhaps such a miscarriage under section 7 may be of as probable occurrence as the non-delivery of a notice posted according to section 100 of the act.

If this be the true construction of that part of the section which provides what sending is sufficient, it follows that the objector has done all that the act requires him to do, to enable him to call on the voter to prove his right, whether the notice arrived or not, and whether it was prevented from arriving by insufficient description of the place of abode or by default of the post-office. So that, supposing, as it was insisted for the respondent, that the evidence of the stamped duplicate is not conclusive as to arrival, and was answered by proof of the contrary, as it was here, it makes no difference as to the right of the objector; as the fact so [*58] *disproved, is not material to his right. The stamp on the duplicate is clearly evidence of the posting on the 24th; and there was no contradiction as to that fact; so that, whatever might be the consequence if it had been shown in evidence that the notice was not really posted on the 24th, as the proof stood, all the facts constituting a sufficient sending were proved without contradiction.

It was objected, secondly, with respect to the notice to the overseers, that such a notice was not within section 100, which applies only to notices to persons objected to; and that section 101 did not help it, as that section says nothing of a duplicate being evidence: so that, as there was no proof of notice to the overseer, except the stamped duplicate, no notice was in effect proved. But it appears to us that the clause in section 101—which provides, that, whenever by this act notice is required to be given or sent to any person whatsoever, or public officer, it shall be sufficient if such notice shall be sent by the post, in the manner and subject to the regulations hereinbefore provided with respect to sending notices of objection by post, with a sufficient direction, addressed to the person to whom the same ought to be sent, at his usual place of abode,—affords a sufficient answer to this objection. For, it seems to us, that this clause applies the provisions in section 100, as to notices to persons objected to, (including that provision which requires the notice to be delivered, open,

and in duplicate, to the post-master, and that the post-master shall stamp and return one part, and its necessary consequence, that such stamped duplicate shall be evidence of the time of posting and of delivery,) to all notices to overseers directed to them at their usual places of abode; and, as nothing appears upon the case stated, and no question was made, respecting the address of the notice to the overseers, we *think the notice to them falls within the same rule as the notice given to the party objected to. It appears, therefore, to us that both of the notices of objection were given in due time, and, consequently, that the decision of the revising barrister must be reversed. Decision reversed.(a)

(a) In *Bishop*, app., *Cox*, resp., an appeal from a decision of the same revising barrister, upon precisely the same state of facts as in the principal case, the decision was reversed, on the same ground.

*60]

*HILARY TERM.

CITY OF ROCHESTER.

GEORGE COLVILL, Appellant; LEWIS, Town Clerk of ROCHESTER, Respondent. Jan. 15.

A notice of objection sent by post, so that it would, in the ordinary course of the post, be delivered on a Sunday, is, nevertheless, well served.

The court cannot entertain an appeal in the absence of the respondent, unless there be an affidavit of service upon him, of notice of the appellant's intention to prosecute the appeal under the 6 & 7 Vict. c. 18, s. 64.

GEORGE COLVILL, on the list of freemen for the city of Rochester, objected, in all respects duly, (except as hereinafter mentioned,) to the name of John Barton Balcomb being retained on the list and register of freemen voters for the said city, wherein the place of abode of the said John Barton Balcomb was described as being St. Nicholas, by posting a notice of such objection at the post-office at Chatham, on Saturday, the 23d of August, 1845; which notice was, in all respects, in the form prescribed by schedule (B), No. 11, to the statute of 6 & 7 Vict. c. 18, and was directed to the said John Barton Balcomb, at St. Nicholas.

The day on which such notice would, in the ordinary course of post, have been delivered at St. Nicholas, was Sunday, the 24th of August.

Objection being duly made to the validity of such notice, on the ground that such notice was delivered and served on Sunday, the barrister decided that this objection ought to prevail, and that such notice was invalid, by reason that the service of the same was effected on Sunday, and was therefore void, as being within the 6th section of the statute 29 Car. 2, c. 7, and within the mischiefs thereby intended to be remedied; and he retained the name of the said John Barton Balcomb on the said list and register of voters.

If the court shall decide that such service was good *and effectual, the name of the said John Barton Balcomb is to be expunged from the list and register of freemen entitled to vote for the said city. [*61]

The cases of twenty-two other voters, similarly circumstanced, were consolidated with the above.

C. Jones, Serjt., for the appellant, on the 12th day of Michaelmas term last, prayed leave to deliver his paper-books in this and another case *nunc pro tunc*; the only excuse suggested for the non-delivery in due time, being the ignorance of the attorney as to the practice of the court under this new jurisdiction. The application was granted.

C. Jones, Serjt., now appeared on behalf of the appellant. The question is, whether the delivery of the notice of objection by the post, at the house of the voter on a Sunday, renders the service bad.(a) The 6th section of the statute 29 Car. 2, c. 7, provides, "that no person or persons, upon the Lord's day, shall serve or execute, or cause to be served or executed, any writ, process, warrant, order, judgment, or decree, (except in cases of treason, felony, or breach of the peace,) but that the service of every such writ, process, &c., shall be void to all intents and purposes whatsoever; and the person or persons so serving or executing the same, shall be as liable to the suit of the party grieved, and to answer damages to him for doing thereof, as if he or they had done the same without any writ, process, warrant, order, judgment, or decree at all." This is not a writ, process, or other judicial proceeding. If the voter had abstained from opening the letter till the Monday, the service clearly would have been unexceptionable. *[*62] [CRESSWELL, J. If the notice is in the nature of process, the fact of the recipient not looking at it until Monday, would not render good an illegal and void service on Sunday. You must contend that a service of the notice on Sunday is good.] Such a service is not within the prohibition of the statute.]

No one appeared for the respondents. But, inasmuch as there was no affidavit of service upon them of the notice required by the 6 & 7 Vict. c. 18, s. 64, (b), the court declined to pronounce any judgment.

C. Jones, Serjt., having on a subsequent day produced the requisite affidavit,

The court reversed the decision of the revising barrister.

Decision reversed. (c)

(a) The case does not expressly find that the notice reached the voter's house on Sunday.

(b) Which enacts, *inter alia*, that "no appeal shall be heard by the court in any case where the respondent shall not appear, unless the appellant shall prove that due notice of his intention to prosecute such appeal was given or sent to the respondent ten days at least before the day appointed for the hearing of such appeal: provided always, that, if it shall appear to the court that there has not been reasonable time to give or send such notice in any case, it shall be lawful for the court to postpone the hearing of the appeal in such case, as to the court shall seem meet."

(c) In an action by the endorsee against the drawer of a bill of exchange for 500*l.*, tried before Dallas, C. J., at Guildhall, it appeared that the bill was dishonoured at Liverpool on Fri-

day, and that no notice was sent by the plaintiff to the defendant until Monday. It was contended for the plaintiff, and ruled by the learned judge, that inasmuch as the notice, if put into the Liverpool post-office on the Saturday, would have reached the defendant at Bilston on the Sunday, the plaintiff was not bound to send notice either on the Saturday or on the Sunday, and the only counsel for the defendant who then could be heard in this court, could not be prevailed upon to move for a new trial. Vaughan, Serjt., and Manning were of counsel with the defendant.

*63]

*BOROUGH OF SCARBOROUGH.

JOHN FLOUNDERS, Appellant; EDWARD SEDGFIELD DONNER, Respondent. Jan. 15.

Where a voter's qualification appears in the list to consist of a successive occupation of houses, the numbers of *each*, if each has a number, must be stated. And, *semble, per Erle, J.*, that, if the omission of the number be supplied to the revising barrister pending the revision, he is bound to amend the description, under the 6 & 7 Vict. c. 18, s. 40.

JOHN FLOUNDERS claimed to be inserted in the list of voters for the borough of Scarborough, in respect of a successive occupation of houses. A list of claims containing the names had been duly published by the overseers; and in that list, the name and description of John Flounders, and of the situation of his property, was as follows:—

Christian Name and Surname.	Place of Abode.	Nature of Qualification.	Street, Lane, &c., where Property situate, and Number of the House, if any, &c.
Flounders, John.	15, Aberdeen Walk.	House. House.	Queen Street. 15, Aberdeen Walk.

The above description is an exact copy, in all respects, of the notice of claim sent in by the said John Flounders to the overseers. The place secondly mentioned as the situation of the house, namely, 15, Aberdeen Walk, is the situation of the house which he at present occupies; and the streets or places where the said houses are stated to be situated are well known, and are not so extensive or populous but that any occupier of any premises in them may be found, by reasonable inquiries. Both the houses constituting the qualification are, and have always been, numbered.

The claim of the said John Flounders was opposed, on the ground that *64] the number of the first house was *not inserted in the list, agreeably to the form prescribed by the 6 & 7 Vict. c. 18, schedule B, No. 3, nor in any claim sent to the overseers by him agreeably to the form No. 6 of the same statute and schedule.

The barrister decided that the said John Flounders was not entitled to be inserted in the list of voters for the said borough,—on the ground that the statute required that the number of each house constituting the qualification should have been contained in the column, describing the situation of the property.

If the court shall be of opinion that the number of the said house need not have been mentioned by him in describing the situation of the same, in the notice of claim, then the name of the said John Flounders is to be inserted in the said list of voters for the said borough, in the terms of his said notice, but not otherwise.

The cases of seven other persons similarly circumstanced are consolidated with the above.

Wharton, for the appellant. The decision of the revising barrister was wrong. A party is not to lose his vote by reason of a mere inaccuracy of description, where reasonable means are given to test the reality of the right. The 40th, 75th, and 101st sections of the 6 & 7 Vict. c. 18, are addressed to the case of such defects. The evidence given before the revising barrister is not to be scanned too rigorously, nor afterwards to be made the subject of discussion here. Under sect. 40, the barrister has power to amend, whether objection be made or not; and here the substantial objection is, that the premises successively occupied by the claimant are not sufficiently described by him in his claim. [TINDAL, C. J.—Was the barrister asked to amend the description?] He decides that the number of the houses ought to have been stated. He seems to have thought this, if a misdescription at all, one which the act gave him no power to amend. [ERLE, J. Do you contend that the barrister's decision is wrong, provided he had power to amend?] No. His finding is, that the description is, in effect, sufficient. [TINDAL, C. J. He expressly decides that the voter is not entitled to be inserted in the list, on the ground that the statute requires that the number of each house, constituting the qualification, should be contained in the column describing the situation of the property. CRESSWELL, J. I take it the barrister meant to decide that it was necessary to state the number of the houses; and that he would not amend, if he could. TINDAL, C. J. I think you may throw overboard the 40th, 75th, and 101st sections.] The description of the qualification in the overseer's list, and that in the claim sent in, stand upon the same footing: *Daniel*, app., *Camplin*, resp., 7 M. & G. 167, 8 Scott, N. R. 999. The fortieth section, also, puts both upon the same footing. The barrister has, in effect, found that the description of the property is not such as to be sufficient for the purpose of identification. In *Wood*, app., *The Overseers of Willesden*, resp., ante, p. 15, "The Grove, Neasdon," was held a sufficient description of the place of abode of the voter, though it appeared that Neasdon was not a street, lane, or other like place. That case shows that the forms are not required to be *strictly* complied with. [TINDAL, C. J. Here the barrister has decided that the claimant was not entitled to be inserted in the list of voters; and the reason he gives for that decision is, that the number of each house constituting the qualification is not stated.] That is not conclusive. In *Gadsby*, app., *Warburton*, resp., 7 M. & G. 18, 8 Scott, N. R. 775, MAULE, J., says: "Although the revising barrister has found that the description of the objector in

*66] his notice was not sufficient, that may be matter of law. He *has, however, stated facts from which it appears the description was sufficient. The question, whether he is right, is therefore regularly raised for our decision." In *Bartlett*, app., *Gibbs*, resp., 5 M. & G. 81, 7 Scott, N. R. 609—the first case in which it was determined that a qualification consisting of the occupation of several premises in succession must be described according to the fact—no objection was taken to the absence of the numbers of the houses: and the same remark applies to the case of *Daniel*, app., *Camplin*, resp., 7 M. & G. 167, 8 Scott, N. R. 999. In *Hitchins*, app., *Brown*, resp., ante, p. 25, where the revising barrister held the description to be insufficient, he exercised the power of amendment given to him by sect. 40, as it is submitted he ought to have done here. The inaccuracy of description, at all events, is cured by the provision found in the latter part of sect. 101, "that no misnomer or inaccurate description of any person, place, or thing named or described in any schedule to this act annexed, or in any list or register of voters, or in any notice required by this act, shall in anywise prevent or abridge the operation of this act with respect to such person, place, or thing, provided that such person, place, or thing shall be so denominated in such schedule, list, register, or notice, as to be commonly understood." In *The King v. Hall*, 1 B. & C. 123, 2 Dowl. & Ryl. 214,(a) ABBOTT, C. J., in delivering the judgment of the court of King's Bench, says: "The meaning of particular words in acts of parliament, as well as in other instruments, is to be found not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used, and the object that is intended to be attained." The omission of

*67] a number cannot be put higher than the omission of a name. *Cases might be suggested in which no additional facility would be given by the insertion of a number; for instance, there may be, and frequently are, several houses in a street that bear the same number.

Bliss, for the respondent. The fifteenth section of the 6 & 7 Vict. c. 18, and the form in schedule (B), No. 8, there referred to, require the number of the house to be stated, if there be any. The direction is positive, and raises no question of construction. The substance of the argument urged on the part of the appellant, is, that, if the description of the property is not strictly in compliance with the form given, it is, at all events, to the like effect; that the omission of the number is aided by the 101st section; and that a party using a reasonable diligence could not have been misled. The fifteenth section, however, though it uses the words "to the like effect," when speaking of the notices of claim to be served on the overseers or town-clerk, Nos. 6 and 7 in schedule (B), omits them when it comes to speak of the lists Nos. 8 and 9. This is not a case of "misnomer or inaccurate description:" it is rather a misdescription. This, it is to be observed, is the case, not of an occupier,

(a) See *Hine v. Reynolds*, 2 M. & G. 96.

but of one who has ceased to occupy the premises as to which the objection arises. [ERLE, J. If the number had been supplied, the barrister ought to have inserted it.] The omission was not supplied; and therefore the question of amendment cannot arise. In *Eckersley*, app., *Barker*, resp., 7 M. & G. 76, 8 Scott, N. R. 899, TINDAL, C. J., assumes that the number, if there be one, must be inserted. He says: "The fourth section of the 6 & 7 Vict. c. 18, requires the notice of claim to be delivered or sent to the overseers, according to the form of notice set forth in schedule (A), and numbered 2, or to that *effect; and the form No. 2, requires the 'street, lane, or other like place, and number of the house (if any), where the property is situate, or name of the property, if known by any, or name of the occupying tenant,' to be inserted; and we think the word 'or' in this form is disjunctive, and creates three different descriptions, and that it is sufficient if the qualification is brought within any one of them; namely, either the street, or lane, and number, if any; the name of the property, if any; or the name of the occupying tenant, if any." Again, in *Dewhurst*, app., *Fielden*, resp., 7 M. & G. 182, 8 Scott, N. R. 1013, an argument is drawn by the same learned judge, from the necessity of a number in the form No. 3, of schedule (B). The question here, is not whether the premises might be found by a reasonable exercise of diligence, but whether the qualification of the voter is properly described. [*68]

Wharton, in reply. The ground of the decision of the revising barrister appears to have been, that the statute and schedule absolutely and positively required the numbers of both houses to be given, and that he had no power to amend. [MAULE, J. The ground of the decision is, that the description given of the property that is supposed to constitute the qualification, is such as to impose an undue difficulty of identification.]

TINDAL, C. J. I think the decision of the revising barrister in this case was right. He decided that the claimant was not entitled to be inserted in the list of voters, upon the ground that the statute required that the number of each house constituting the qualification should be contained in the column describing the situation of the property. And such, I think, is the *proper construction of the fifteenth section, coupled with the form given in the schedule. The moment this court determined that it is not sufficient, where the qualification consists in the occupation of several premises in immediate succession, to register only in respect of the premises in the party's occupation at the time of making out the list of voters, but that all the premises the occupation of which forms the qualification must be stated, (a) the law must apply as much to the one occupation as to the other. Probably, indeed, there would be a greater necessity for giving the number of the former residence: for, the party's present place of abode would be more easily found than one which he had quitted. I think, therefore, the number of the house in Queen Street [*69]

(a) See *Bartlett*, app., *Gibbs*, resp., 5 M. & G. 81, 7 Scott, N. R. 609.

should have been given. The answer attempted to be set up, is that the revising barrister has stated facts from which the court must necessarily assume that he was doubting whether he had power to amend, and that therefore we ought to supply the omission: and the 40th and 101st sections are relied on. I take this part of the fortieth section to apply only to a case where the barrister, not being satisfied that the voter, his place of abode, or the nature or description of his qualification is sufficiently described for the purpose of being identified, has expunged the name from the list, and the matter so omitted or insufficiently described is supplied to his satisfaction before the completion of the revision of the list; in which case he is empowered to amend. The party, therefore, should have given the necessary evidence, and called upon the revising barrister to amend the description. As far as the statement of the case goes, we must assume that no such evidence was given, or none that was satisfactory; and therefore the appellant is not now *in a situation to avail himself of the
 *70] fortieth section. The 101st section appears to me to be equally far removed from the subject-matter of inquiry. That section enacts that "no misnomer or inaccurate description of any person, place, or thing named or described in any schedule to this act annexed, or in any list or register of voters, or in any notice required by this act, shall in anywise prevent or abridge the operation of this act with respect to such person, place, or thing, provided that such person, place, or thing shall be so denominated in such schedule, register, or notice, as to be commonly understood." We cannot predicate that of a description like this: there may be 500 houses in Queen Street: how can we say which of the 500 is "commonly understood" by the description here given? Those words would rather seem to apply only in the case of some clumsy description, which, though inaccurate, sufficiently pointed to the house or other thing described. The real question is, whether the statute requires the number of the former residence to be given in a case like this. I think it does, and that the decision must therefore be affirmed.

MAULE, J. I also am of opinion, for the reasons given by the Lord Chief Justice, that the decision of the revising barrister was right.

CRESSWELL, J. I am of the same opinion. The description given of the property, the occupation of which constituted the qualification of the claimant in this case, was not a compliance with the statute. The fortieth section enacts, that, "whenever the Christian name, or the place of abode, or the nature of the qualification, or the local or other description of the property of any person who shall be included in any such list, and the name
 *71] of the occupying tenant thereof, shall be wholly *omitted, in any case where the same is by this act directed to be specified therein, or if any person whose name is included in any such list, or his place of abode, or the nature or description of his qualification, shall in the judgment of the revising barrister be insufficiently described for the purpose of being identified, such barrister shall expunge the name of every such

person from such list, unless the matter or matters so omitted or insufficiently described be supplied to the satisfaction of such barrister before he shall have completed the revision of such list, in which case he shall then and there insert the same in such list." Now, would the description here given enable any person to identify the house in Queen Street? Certainly not. Then, that being so, the barrister's duty was to expunge the name of the voter from the list, unless the matter omitted or insufficiently described was supplied to his satisfaction. There is no statement in the case that any attempt was made to supply the omission. As to the 101st section, I entirely concur with what has been said by the Lord Chief Justice. To be sufficient, the description must be such as to be commonly understood. But then you must understand all that is required by the statute: and, if the statute requires the numbers of both houses to be given, how can they be *understood* from the statement here?

ERLE, J. I also think the decision of the revising barrister must be affirmed. The number of the house is omitted in a case in which there was a number. The barrister clearly was right in expunging the name, if he thought the description insufficient, or if it was wholly omitted, and not supplied to his satisfaction before the completion of the revision. I am clearly of opinion, that, if the number had been brought to the revising barrister, he had power under the fortieth section to *insert it, and was bound to insert it. And, if the question intended to be raised for our opinion was, whether or not he had such power, it is very much to be regretted that the case does not properly raise it. But, assuming that the number was not supplied to the barrister's satisfaction, I see no ground for finding fault with his decision. Decision affirmed. [•72]

LANCASHIRE, SOUTHERN DIVISION.

CHARLES EDWARD RAWLINS, jun., Appellant, The Overseers of
WEST DERBY, Respondents. Jan. 15.

When the 20th of July falls on a Sunday, service of a notice of claim upon an overseer under the 6 & 7 Vict. c. 18, s. 4, by leaving it at his *place of abode* on that day, is good service. *Smble*, that, where the respondent appears, he is precluded from objecting to the form of the service of the notice of appeal required by ss. 62, 64.

THE overseers of the township of West Derby, in the southern division of the county of Lancaster, objected to the names of George Atkinson, and of thirty-nine other persons—whose names and descriptions were set forth in a schedule annexed to the case,—being retained on the list of claimants to vote in the said township.

The barrister struck out the names of the said claimants from the said list, subject to the opinion of the court of Common Pleas on the following case:—

All the said claims were delivered at the dwelling-house of one of the overseers of the said township of West Derby, in his absence, about

9 o'clock of the evening of Sunday, the 20th of July last. The overseers, nevertheless, published such claims in the list of claimants, but inserted opposite to each name the word "objected;" and at the revision of the said list, they contended that such service of the said claims respectively

*73] was insufficient and invalid, having been made *on a Sunday, and the following day being too late by law for the service of such notices; and that such claimants therefore were not entitled to have their names retained on the said list.

The barrister allowed the objection, and consolidated the several cases.

Arnold, for the respondents, took a preliminary objection—that the notice of the appellant's intention to prosecute the appeal had not been given or sent to the proper parties; the barrister having, under the 6 & 7 Vict. c. 18, s. 43, nominated *the overseers of the township of West Derby* to be the respondents, and the notice being headed "*Edward Rawlins*, appellant, and *Thomas Augustus Granville Dolling*, overseer of West Derby, respondent," and served upon Dolling only. He submitted, that, though a notice addressed to the overseers generally, and served upon one of them, might be sufficient, the notice in question clearly was not so, for *non constat* that Dolling was in office at the time the overseers were named respondents. [MAULE, J. Do you appear?] In the case of affidavits informally headed, the party presenting the objection is not therefore taken to appear. [MAULE, J. Does that apply to an affidavit of service?]

Crompton, contra, submitted that taking the sixty-second section and the interpretation clause (s. 101) together, the notice was sufficient.

TINDAL, C. J. If the respondents appear, there is no necessity for proving the service of the notice under sect. 64. If they do not, we must deal with the case as we best may. (a)

*74] **Arnold* elected to appear.

Crompton, for the respondents. By the 6 & 7 Vict. c. 18, s. 4, persons desirous of having their names inserted in the register for the county, are required to give notice of their claims to the overseers "on or before the 20th of July" in every year. The question is, whether words are to be inserted in the act that the legislature has not thought fit to place there, viz., "unless such day shall be Sunday." Wherever it has been intended to except Sunday in the act, it is done by apt and express words, as, amongst other instances, in sections 5, 8, 12, 18, 20. It would be strange indeed if the legislature had intended to except Sunday for such a purpose as this, seeing that the overseers are required (s. 23) to publish these lists on the church doors. [TINDAL, C. J. That is because it is supposed to be a common centre.] At common law, all acts except those of a judicial nature might be done on a Sunday. In *Mackally's Case*, 9 Co. Rep. 66 b, it is said that "no judicial act ought to be done on that day, but ministerial acts may be lawfully executed on the Sunday; for,

(a) See *Colvill*, app., *Lewis*, resp., *anté*, p. 60.

otherwise, peradventure, they can never be executed. Before the Reformation, fairs and markets were commonly held on Sunday: and their legality seems to have been recognised after the Reformation; for, in *Comyns v. Boyer*, Cro. Eliz. 485, it was held that "a fair holden upon the Sunday is well enough, although by the statute (a) there is a penalty inflicted upon the party that sells upon that day; but it makes it not to be void." (b) [TINDAL, C. J. A re-entry for *condition broken on a Sunday is [*75 good.] So also is a demand of possession on that day. (c) This is clearly not an exercise of the party's ordinary calling, within the first section of the 29 Car. 2, c. 7; nor is it the service of any "writ, process, warrant, order, judgment, or decree," within the sixth section. Even a contract, *per se*, is not necessarily void, if made on a Sunday. In *The King v. Whitnash*, 7 B. & C. 596, 1 M. & R. 452: (d) a contract of hiring made on a Sunday between a farmer and a labourer was held not to be within the statute of Charles. So, in *Begbie v. Levi*, 1 Cr. & J. 180, a bill of exchange drawn on a Sunday was held not to be avoided by that statute. So, in *Peate v. Dicken*, 1 Cr., M. & R. 422, an agreement entered into by attorney for the settlement of his client's affairs, on a Sunday, was held good. A sale of goods on a Sunday, not made in exercise of the vendor's ordinary calling, as, for instance, the sale of a horse by a banker, is not within the statute: *Drury v. Defontaine*, 1 Taunt. 131. In *Alanson v. Brookbank*, Carth. 504, (e) service of a citation, by fixing it on the church door, on a Sunday, was held to be good. And in *Bedoe v. Alpe*, W. Jones, 156, it was held to be no ground of error that an information was alleged to have been exhibited on a Sunday. In *Comberback* (page 462) it is said, (f) that "the delivery of a declaration in ejectment upon a Sunday is good, *per curiam*. (g) It was likewise said, that to have an attachment for non-performance of an award, there must be personal service, which, if it be on a *Sunday, though it is not good to have an attachment for non-payment on that day, yet it is for refusal on any other." [*76 [MAULE, J. The award being retained, the party has notice of it on the Monday. Here, you cannot avail yourself of that, because the Sunday was the last day.] There was nothing to be done by the overseers on the Sunday. In *Walgrave v. Taylor*, 1 Lord Raym. 705, Lord Holt, C. J., seemed to think the delivery of a declaration on a Sunday bad, because the 29 Car. 2, c. 7, s. 6, intended to restrain all legal pro-

(a) 27 H. 6, c. 5, which enacts that "all manner of fairs and markets on the principal feasts, and Sundays and Good Friday, shall clearly cease from all showing of any goods or merchandise, (necessary victual only excepted,) upon pain of forfeiture of all the goods aforesaid so showed, &c., the four Sundays in harvest except."

(b) The exception of the four Sundays in harvest is the reservation of an old, not the creation of a new right.

(c) Selw. N. P. p. 712.

(d) And see *Sandiman v. Bridge*, ib. 457, n.

(e) S. C. *per nom.* *Allen v. Brookbank*, 2 Salk. 625; Anonymous, 5 Mod. 450.

(f) 9 Will. 3, *ut videtur*.

(g) Such a service was held to be void within the 29 Car. 2, c. 7, s. 6, in *Doe d. Warren v. Roe*, 8 D. & R. 342. And see *Doe v. Roe*, 5 B. & C. 764, S. C. *nom.* *Goodtitle d. Mortimer v. Nottitle*, 2 D. & R. 232; *Doe v. Roe*, 8 D. & R. 592.

ceedings on that day. But Powys and GOULD, Js., held otherwise, because such delivery was *quasi* a notice, and *as a letter*, and not a process. [CRESSWELL, J. In *Roberts v. Monkhouse*, 8 East, 547, service of a notice of plea on a Sunday was held bad, and in *Hughes v. Budd*, 8 Dowl. P. C. 315, service on Sunday of a notice to produce was also held void. MAULE, J. Service of a *subpœna duces tecum* on a Sunday would be a void service. That is very much like this case.] A *subpœna duces tecum* is in the nature of process, and therefore within the letter of the act. The question whether a service on Sunday of a notice of appeal was good, was raised in *The Queen v. The Justices of Middlesex*, 12 Law J., N. S., M. C. 59, but the court gave no opinion upon it.

Arnold, for the respondents. The decision of the revising barrister was right. The question here is, whether the service of the notices of claim was affected within the time required by the act of parliament. By the fourth section of the 6 & 7 Vict. c. 18, the notice of claim must be delivered to the overseers *on or before* the 20th of July. It is not necessary to contend that a service on Sunday is absolutely void, either at com-
 •77] mon law or by the statute 29 Car. 2, c. 7; for, it may be *conceded

that it is neither a work of the ordinary calling of the party, so as to be affected by section 1, nor a writ, process, &c., within section 6. It may also be conceded, that, if Sunday had been the 19th, a service on that day might have operated as a good service on the Monday. But, the 20th of July being the last day on which the notice could, by law, be served, and that day being Sunday, the question is, whether a service on Sunday was in time. The receipt of these notices was a matter which the overseer was not bound to attend to on a Sunday; he was not bound to open the letters until Monday, and then the notice would have been too late. The 101st section authorizes a service of these notices by leaving them at the *place of business* of the overseer; could it be contended for a moment, that a service at the place of business on a Sunday, the overseer being absent, would, under the circumstances, be sufficient, seeing that it could not come to the hands of the overseer until the following day? There is some parity of reasoning between this case and the case of a notice of dishonour of a bill of exchange; the ground of that rule being, that a party is not bound to attend to any matter of business on a Sunday: Byles on Bills, p. 184; *Wright v. Shawcross*, 2 B. & Ald. 501, n. So, as to the days of grace, if the last of the three happens to be Sunday, the payment must be made on Saturday—for the same reason, viz., that no man is bound to attend to his ordinary calling on the Lord's day.^(a) [CRESSWELL, J. That is regulated by the law merchant, which engrafs upon the days of grace the condition that the last shall not be Sunday. MAULE, J. Here we have a positive law, that a certain act shall be done
 •78] on or before the 20th of July; and there is no exception. According to your argument, the party for whose benefit the number of *days

(a) Byles on Bills, 133.

is given, loses the Sunday, if it happens to be the last.] Some analogy may also be drawn from the rule of Hilary term, 2 W. 4, r. 8, which directs, "that, in all cases in which any particular number of days, not expressed to be clear days, is prescribed by the rules or practice of the courts, the same shall be reckoned exclusively of the first day, and inclusively of the last day, unless the last day shall happen to fall on a Sunday, Christmas Day, Good Friday, or a day appointed for a public fast or thanksgiving, in which case, the time shall be reckoned exclusively of that day also." According to the old practice, Sunday was invariably excluded from the computation, if the last day: for instance, in rules to plead, (a) rules to reply, (b) notices of inquiry, (c) and the like. [CRESSWELL, J. Lord KENYON and Lord ELLENBOROUGH held notices of inquiry to be in the nature of process. (d)] A notice of executing a writ of inquiry clearly is not a writ or process within the 29 Car. 2, c. 7, s. 6. The instances in the statute 6 & 7 Vict. c. 18, of Sunday being expressly excepted, afford little support to the argument urged on the part of the appellant; the exception, in each case, seems to have been introduced *ex abundanti cautela*.

Crompton was not called upon to reply.

TINDAL, C. J. It appears to me that this case may be determined by reference to the very plain language of the fourth section of the act. That section directs that all persons who shall be desirous to have their names inserted in the register, "shall, on or before the 20th day of July, deliver or send to the overseers a notice signed by him, of his claim, according to the form of notice set forth in that behalf in the form numbered 2, schedule (A), or to the like effect." The statute, therefore, in plain terms, gives the party power to send in a claim at any time on or before the 20th of July. The argument urged on the part of the respondent, is, that that direction is not obligatory in all cases; but that, when the 20th of July happens to be a Sunday, the day is to be excepted. The language being so plain, we must take the act as we find it, unless there be some equal power requiring us to engraft upon it the proposed exception; especially, as we see, that, where the legislature have intended to except Sunday, they have done so in express terms. As to the statute 29 Car. 2, c. 7, this clearly is not a matter within the prohibitory part of that act, the first provision of which applies to things done by persons in the exercise of their ordinary callings, and the second to the service of writs or process of a judicial character, within neither of which can the present case be classed. Many things at common law were feasible and were held valid if done on a Sunday: an entry for condition broken, or to preserve an estate, was equally valid whether made on a Sunday or on any other day; so, a demand of possession, to support an ejectment,

(a) Tidd's Practice, 9th edit. p. 474.

(b) Tidd, 676.

(c) Tidd, 577.

(d) In *Roberts v. Monkhouse*, 8 East, 547, Lord Ellenborough says,—"All notices on which rules are made, are process in respect to the subject-matter; not indeed process with respect to the writ, but process in respect to the rule."

might well be made on that day; and all contracts, not made in the ordinary callings of the parties, are still valid though made on Sunday. I see no reason, therefore, why a notice of this sort may not be served on a Sunday. To make the argument drawn from the notice of dishonour of a bill of exchange at all favour the construction put forward on the part of the respondent, it must be contended that the notice would be void if *80] forwarded on a Sunday, which is not the case, *although no doubt the party receiving a notice of dishonour on a Sunday might abstain from opening it until the following morning. I think, for these reasons, that the decision of the barrister is wrong, and must be reversed.

MAULE, J. I am of the same opinion. The act requires the notice of claim to be given or sent to the overseers on or before the 20th of July. If that be done, the overseers are enabled to perform the duty imposed upon them by section 5, of preparing lists of claimants before the last day of the month; the object of section 4 being to give them for that purpose all the interval between the 20th and the 31st of July. They have had all that time here. If the 20th of July had not been Sunday, there is no doubt the claimant might have sent in his claim at any time on that day: and I must confess I find nothing in the act to deprive him of that right because the 20th of July happened to fall on a Sunday. I do not think we ought to seek any other meaning than the words naturally bear, seeing that they are so clear and unequivocal. It may be conceded, that, if they comprehended something *contra bonos mores*, or against the common law, an exception might be implied. A party is not to commit a breach of the law of the land because he is required to do a certain act within a given time. But I know of no law that prevents these notices from being served on a Sunday. Certain things are by statute declared void if done on a Sunday: but *primâ facie* any act may be done on that day. In the case of bills of exchange, the custom of merchants has engrafted upon it the exception of Sunday from the days of grace, and a party is not called upon to take a notice of dishonour on that day. In the reign of Charles the Second an act of parliament passed providing that certain things that *81] formerly might have *been done on Sunday, should no longer be done on that day: all other things being left to the freedom of the common law. There is therefore no ground for saying that the notices in question were not properly delivered. It may be remembered that we have already decided that a delivery by post may be made on a Sunday.(a) The post-master is, by law, required to deliver letters on that day. For these reasons, I am of opinion that the decision of the revising barrister was wrong, and ought to be reversed.

CRESSWELL, J. I am entirely of the same opinion. The statute provides that the notices of claim shall be delivered "on or before the 20th of July." Upon that provision we are invited to engraft an exception—unless that day shall happen to be Sunday. How are we to follow that

(a) Colvill, app., Lewis, Resp., antè, p. 60.

out? By saying, that, in that event, the last day shall be the 19th? Or by extending it to the 21st? How can we say what the legislature would have done? (a) I agree with the Lord Chief Justice and my brother MAULE, that there is no reason for departing from the plain words of the statute.

ERLE, J. I am of the same opinion. We should be disregarding the plain and express words of the statute, if we held that the delivery of these notices on a Sunday is not valid. Such delivery is no violation of [*82] "any known rule of law. The overseer who receives the notice is not called upon to perform any duty that can interfere with the most scrupulous observance of the Lord's day. Decision reversed. (b)

(a) In general, where one branch of an alternative condition becomes impossible, the other branch stands as if the former had not been mentioned. If the statute of 29 Car. 2, c. 7, s. 6, had prohibited the service of notices as well as the service or execution of "writs, process, warrant orders, judgments, or decrees, upon the Lord's day," the words "on or before the 20th of July" in the reform act would probably have been read—on or before the 20th of July in those years in which the 20th of July shall not fall on a Sunday, and before the 20th of July when that day shall fall on a Sunday.

(b) And see Com. Dig. *Temps*, (B 3); 20 Vin. Abr. *Sunday*, 61.

SOUTHERN DIVISION OF CHESHIRE.

SAMUEL HICKTON, Appellant, DANIEL ANTROBUS, Respondent.
Jan. 19.

Sending a notice of objection to the party objected to by the post, pursuant to the directions of the 6 & 7 Vict. c. 18, s. 100, is a sufficient substitute for giving the notice to the party, or leaving it at his place of abode, as required by s. 7.

Where, therefore, a notice was posted, under s. 100, in sufficient time to have reached the party, according to the ordinary course of post, on the 25th of August: *Held*, that such service was sufficient to call upon the party to prove his qualification, notwithstanding that the actual delivery was accidentally delayed until the 27th.

And, *held*, that the provisions of s. 100 are equally applicable to notices to overseers, directed, as provided by s. 101, to their usual places of abode.

SAMUEL HICKTON, of Rood Lane, Congleton, a person on the register for the southern division of the county of Chester, objected to the name of Daniel Antrobus, as not entitled to be inserted in the list of voters for the said division.

The facts of the case were as follow:—Duplicate notices of objection, stamped at the Manchester post-office, on the 24th of August, one directed to the party objected to, and the other to the overseers of the township of Congleton, were produced, and duly proved before the barrister. These notices of objection would, in the ordinary course of post, be delivered at the place of abode as described in the said list, and also to the overseers of Congleton, on the 25th of August. The notices themselves were produced on behalf of Daniel Antrobus, and bore the Congleton post-mark of August 26th, and were not delivered to the overseers, or at the place of abode of the person objected to, until that day. Upon inquiry into the cause of the detention, it appeared that so many notices of objection had been posted at the Manchester post-office on that and the two

preceding days, that the postmaster was unable to transmit the notices in time. He alleged the sudden and enormous influx of letters as a reason for the detention.

It was contended on the part of Samuel Hickton, that the objector had complied with the provisions of the act 6 & 7 Vict. c. 18, which enacts, sect. 100, "that the production by the party who posted such notice, of such stamped duplicate, shall be *evidence* of the notice having been given to the person, at the place mentioned in such duplicate, on the day on which such notice would, in the ordinary course of post, have been delivered to such person."

On the part of Daniel Antrobus it was submitted that this was only a mode of proof, and not *conclusive*.

The barrister held, that the stamped duplicates were not conclusive evidence of the notices of objection being delivered in time; and that (there being no pretence of any fraudulent or wilful detention) the notices of objection were delivered too late. He therefore retained the name of the voter on the list.

The question for the opinion of the court is, whether, under the circumstances mentioned in the above statement, the name of the said Daniel Antrobus was rightly retained on the said list of voters for the said southern division of the county of Chester. If the court shall be of that opinion, the register is to stand without amendment. If the court shall be of a contrary opinion, then the register is to be amended by expunging
*84] therefrom, *from the list of voters for the township of Congleton, the name of the said Daniel Antrobus.

Cockburn (with whom was *Kinglake*, Serjt.) appeared for the appellant. But

Welsby, for the respondent, admitted that he could not distinguish the present case from that of *Bishop*, app., *Helps*, resp., (a) and that therefore the decision of the revising barrister must be reversed.

Per curiam;

Decision reversed. (b)

(a) *Antè*, p. 45.

(b) See *Bayley*, app., *The Overseers of Nantwich*, resp., post, p. 118.

LANCASHIRE, SOUTHERN DIVISION.

FRAZER WILLIAM HOYLAND, Appellant, HENRY BREMNER,
Respondent. Jan. 19.

A conveyance from one vendor to several persons, who purchase with the intention of obtaining and multiplying votes by splitting and dividing the interest, the vendor not being cognisant of such purpose, is valid. Nor is such conveyance brought within the 7 & 8 W. 3, c. 25, s. 7, by the mere knowledge, on the part of the vendor's solicitor or agent, of the object of the purchasers.

FRAZER WILLIAM HOYLAND, and seventeen other persons whose names appear in the first schedule annexed to this case, were objected to as not

being entitled to have their names retained in the list of claimants for the township of Newton, in the southern division of the county of Lancaster, in respect of their several qualifications mentioned in such list.

The barrister struck out the names of all the said *claimants from the said list, subject to the opinion of the court of Common Pleas on the following case :—

It appeared in evidence, that, some time during the latter part of the year 1844, one Charles Duffield, a house-agent in Manchester, was employed by the claimants,—who were all members or supporters of a certain political association called the Antimonopoly Association,—to procure for them qualifications to vote for members of parliament for South Lancashire. Accordingly, Duffield, in the month of January last, applied to one Worthington, a solicitor in Manchester, who was known by Duffield to have property on sale which would confer qualifications to vote for the division of South Lancashire, to purchase such qualifications for Hoyland and the other claimants. He agreed with Duffield to sell certain freehold land and houses in the township of Newton, the property of one Whittaker, who had employed Worthington to dispose of this and other real estate. *No contract in writing* as to the purchase was entered into between any of the purchasers, or Duffield as their agent, and Whittaker. Duffield, as agent for the purchasers, employed Worthington to draw the conveyance on their behalf; and they did not personally consult him (Worthington) relative to the purchase. Different portions of the above freehold premises were conveyed to the claimants, in fee, by several separate deeds, in all nine; such claimants, where more than one purchaser was included in the conveyance, taking their respective shares as tenants in common. All the conveyances were duly executed before the 31st of January last; and the purchase-money for each was handed over to Worthington, at the time of execution, by Duffield, who had previously received it from the purchasers. The price given in respect of each purchase appeared to be the fair marketable value of the property bought. The claimants have each received *the rents of their respective portions or shares, [*86 which are of a sufficient value to confer a vote.

It did not appear that Whittaker knew of the object which the claimants had in view in making their purchases.

The barrister was of opinion that the object of the claimants was to acquire for themselves votes for the purpose of multiplying voices for the election of members of parliament for the southern division of Lancashire, and for that purpose to split and divide their interest in the houses and land so purchased by them. And he was further of opinion that such object was known, and acquiesced in, by the vendor's solicitor before the execution of the several conveyances above referred to. He therefore thought all such conveyances void for the purpose of conferring such votes as aforesaid, under the 7 & 8 W. 3, c. 25.

In the first schedule above referred to, the names, places of abode,

&c., of the several persons objected to, were stated in the following form:—

TOWNSHIP OF NEWTON.

Christian Name and Surname of each.	Place of Abode.	Nature of Qualification.	Street, Lane, &c., in this Township where Property situate, &c.
Hoyland, Frazer William.	Western Park, Moss Side, near Manchester.	Undivided share of freehold land and dwelling-houses.	Droylsden Road.

The appeal in the above cases was, by consent of the parties, consolidated with that of twenty-five other persons named in the schedule hereinafter contained, whose names the barrister had struck out of the list of claimants in the township of Liverpool, the facts being similar with those above stated, except that, as to the claimants in the township of Liverpool, *87] there were contracts in writing entered into between the vendors and purchasers, and at the time of signing such contracts the vendor's solicitor was not privy to the objects which the claimants had in view in making the purchase, although he was privy to such objects before the execution of the respective purchase-deeds.

TOWNSHIP OF LIVERPOOL.

Christian Name and Surname of each.	Place of Abode.	Nature of Qualification.	Street, in this Township &c., where Property situate, &c.
Bayliffe, William.	Princes Street, Woodside, Cheshire.	Freehold houses.	Lowther Street, G. D. and S. J., tenants.
Branker, John Houghton.	Field House, Wavertree, near Liverpool.	Do. (a)	Do. (a)

Cockburn, (with whom was *Kinglake*, Serjt.,) for the appellant. This case is not distinguishable from *Marshall*, app., *Bown*, resp., 7 M. & G. 188.(b) There, A. having contracted for the purchase of B.'s house for a valuable consideration, sold it to C., D., E., F., G., and H. in equal shares, and caused a conveyance to be executed from B. to the sub-vendees, as tenants in common. A. was not stated to have been a party to the conveyance; the purchase-money was paid to B. by the hands of A., but was the proper money of the sub-vendees. The house was let, and the sub-vendees received the rents for their own use respectively. The object of A. in proposing the purchase to the

(a) The insertion of the word "ditto," to avoid repetition, is not warranted by the statute; and it might lead to great confusion if the name immediately above it happened to be expunged.

(b) And addenda to 7 M. & G. p. 1068; 8 Scott, N. R. 889.

sub-vendees, was, to increase the number of voters; but the purchase on the *part of the sub-vendees was a *bonâ fide* investment of their money: they expected that the possession of the property would entitle each of them to vote; but there was no understanding before or at the conveyance, that they should vote, or for what party they should vote. And it was held that the conveyance was not void under the 7 & 8 W. 3, c. 25, s. 7, and that the sub-vendees were entitled to be registered. Here, the revising barrister decided that the case before him was not governed by that case, because the solicitor for the vendor was aware that the object of the purchasers was to acquire votes by splitting and dividing the interest in the houses and land so purchased by them, and that he acquiesced therein. The *grantor*, however, not being cognisant of the supposed illegal purpose of the purchasers, the case is clearly not within either the statute of William,^(a) or the statute 10 Ann. c. 23.^(b) The last-mentioned statute *pre-supposes a fraudulent intention on the part of the *grantor* personally. [*89]

Arnold, for the respondent. The 53 G. 3, c. 39, s. 2, shows that the statute of William was intended to operate on estates that could be beneficially enjoyed. Here, the knowledge of the vendor's agent is the knowledge of the vendor himself. Any representation or warranty made by the former would bind the latter: *Fitzherbert v. Mather*, 1 T. R. 12, 16, *Irving v. Motly*, 7 Bingh. 543. [CRESSWELL, J. Not, if beyond the scope of his authority.](c)

(a) Which enacts, s. 7, "that no person shall be allowed to have any vote in the election of members to serve in parliament, for or by reason of any trust-estate or mortgage, unless such trustee or mortgagee be in actual possession, or receipt of the rents and profits, of the same estate; but that the mortgagor or *cestui que trust*, in possession, shall and may vote for the same estate, notwithstanding such mortgage or trust; and that all conveyances of any messuages, lands, tenements, or hereditaments, in any county, city, borough, &c., in order to multiply voices, or to split and divide the interest in any houses or lands among several persons, to enable them to vote at elections of members to serve in parliament, are hereby declared to be void and of none effect, and that no more than one single voice shall be admitted for one and the same house or tenement."

(b) Section 1, after reciting the 7 & 8 W. 3, c. 25, s. 7, "for the more effectual preventing of such undue practices," enacts, "that all estates and conveyances whatsoever made to any person or persons, in any fraudulent or collusive manner, on purpose to qualify him or them to give his or their vote or votes at such elections of knights of the shire, (subject nevertheless to conditions or agreements to defeat or determine such estate, or to reconvey the same,) shall be deemed and taken, against those persons who executed the same, as free and absolute, and be holden and enjoyed by all and every such person or persons to whom such conveyance shall be made as aforesaid, freely and absolutely acquitted, exonerated, and discharged of and from all manner of trusts, conditions, clause of re-entry, powers of revocation, provisos of redemption, or other defeasances whatsoever, between or with the said parties, or any other person or persons in trust for them, or any of them, for the redeeming, revoking, or defeating such estate or estates, or for the restoring or re-conveying thereof, or any part thereof, to any person or persons who made or executed such conveyance, or to any other person or persons in trust for them, or any of them, shall be null and void to all intents and purposes whatsoever; and that every person who shall make and execute any such conveyance or conveyances as aforesaid, or being privy to such purpose, shall devise or prepare the same, and every person who, by colour thereof, shall give any vote at any election of any knight or knights of the shire to serve in parliament, shall, for every such conveyance so made, or vote so created or given, forfeit the sum of 40*l.*" &c.

(c) For which see *Trusswell v. Middleton*, 2 Roll. Rep. 269, 270; *Cro. Jac.* 653; *Strode v. Dyson*, 1 J. P. Smith, 400; *Alexander v. Gibson*, 2 Camp. 555; *Pickering v. Bush*, 15 East, 38, 45

TINDAL, C. J. The agent's knowledge cannot affect the title. The barrister not having found that the vendor had any illegal purpose in view, or any knowledge of any illegal object on the part of the purchasers, we think the case is within the principle of *Marshall*, app., *Bown*, resp., and that the decision is wrong. Decision reversed.

*90]

*CITY OF WESTMINSTER.

JAMES BISHOP, Appellant, FRANCIS SMEDLEY, High Bailiff of
WESTMINSTER, Respondent. Jan. 26.

A. claimed, under the 2 W. 4, c. 45, s. 30, to be rated in respect of premises occupied by him, and asked the overseer whether there were any rates due; the overseer saying that he did not know, A. added—"If there are, I am prepared to pay them," but he did not produce or offer money: the overseer answered, "I'll see to it," and A. went away, and made no further inquiry on the subject:—*Held* not a sufficient tender to entitle A. to the benefit of that section.

JAMES BISHOP claimed to be registered as occupier of a house, No. 213, Piccadilly, in the parish of St. James, Westminster.

The revising barrister decided that the said James Bishop was not entitled to have his name inserted in the list of voters, in consequence of his not having been rated, in respect of the premises which he occupied as aforesaid, during the twelve months ending on the 31st of July, 1845, and of his not having paid, on or before the 20th of July, all the rates which were due in respect of such premises, previously to the 6th of April preceding; subject, however, to the opinion of the court of Common Pleas upon the following case:—

Bishop had never been rated to the poor-rate for the house which he occupies. The only name that appears upon the rate-book is that of Edmund John Scott, the landlord. On the 20th of July there remained a sum of 3*l.* 2*s.* 6*d.* unpaid of rates due on the 6th of April last.

Bishop's evidence, in support of his claim, was to the following effect:—"On the 19th of June last, I called on Mr. James Catchpole, one of the overseers, at his shop in Regent Street. I there delivered to him a notice of claim to be rated for the house I occupy. I asked Catchpole whether there were any rates due. He said he did not know. I then said, 'If there are, I am prepared to pay them.' Catchpole replied, 'I'll see to it.' I never made any further inquiry; and I never heard again
*91] upon the subject. I am sure that when I called *upon Mr. Catchpole, I had money in my pocket; because I remember having first gone home for a 10*l.* note. Nothing more than what I have stated passed between me and the overseer."

The revising barrister held, that the effect of the indulgence given by the 30th section of the 2 W. 4, c. 45, to persons claiming to be rated, could not be to put them in a better position than those persons were in, who were *actually* rated; and that Bishop was bound to see that the rates

due on the 6th of April, in respect of his premises, were paid on or before the 20th of July. He, also, decided, that there was not, according to Bishop's own evidence, sufficient proof, in this case, of such a tender of rates on the 19th of June, as is required by the statute.

If the court of Common Pleas shall be of opinion that the decision was wrong, the name of the appellant is to be inserted in the register of voters.

Arnold, for the appellant. The question arises upon the thirtieth section of the 2 W. 4, c. 45.(a) The *twenty-seventh section having re- [92
quired that the voter should be rated, and that he should have paid
the rates that should have become payable from him in respect of the
premises, previously to the 6th of April preceding; the thirtieth section
enables him to acquire the same right by payment or tender of the rates,
though not actually rated. Here, the claimant, having no better means
of knowing what is due, in respect of the premises, than by applying to
the overseer, whose duty it was to know the fact, inquires of him whether
there were any rates due, saying that, if there are, he is prepared to pay
them. The overseer not being able to inform him, no tender is actually
made. [MAULE, J. The rate is a public thing; the party might, by in-
specting it, ascertain the amount.(b)] He would not be able to ascertain,
by inspecting the rate, whether his landlord had paid it or not. The facts
clearly show a waiver or dispensation of a tender by the overseer.
[TINDAL, C. J. How can the overseer dispense with a tender required
by an act of parliament? The case of an ordinary tender is different; a
man may well dispense with his own rights.] Suppose the precise sum
of 3*l.* 2*s.* 6*d.* had actually been tendered, the position of the overseer
would not have been altered, inasmuch as he did not know the amount
that was due. [MAULE, J. The overseer might have given him credit
for accuracy, and have taken that sum.] The court will not require more
strictness in a tender under an act of parliament than in a tender at com-
mon law. [MAULE, J. That may be so; and possibly this might have
been sufficient, if the overseer had refused to ascertain the amount.] In

(a) Which enacts, "that, in every city or borough which shall return a member or members to serve in any future parliament, and in every place sharing in the election for such city or borough, it shall be lawful for any person occupying any house, warehouse, counting-house, shop, or other building, either separately or jointly with any land occupied therewith by him as owner, or occupied therewith by him as tenant under the same landlord, in any parish or township in which there shall be a rate for the relief of the poor, to claim to be rated to the relief of the poor in respect of such premises, whether the landlord shall or shall not be liable to be rated to the relief of the poor in respect thereof; and upon such occupier so claiming, and actually paying or tendering the full amount of the rate or rates, if any, then due in respect of the same premises, the overseers of the parish or township in which such premises are situate, are hereby required to put the name of such occupier upon the rate for the time being; and in case such overseers shall neglect or refuse so to do, such occupier shall nevertheless, for the purposes of this act, be deemed to have been rated for the relief of the poor in respect of such premises, from the period at which the rate shall have been made in respect of which he shall have so claimed to be rated as aforesaid," &c.

(b) The rate is open to the inspection of rate-payers. See *Rez v. Clapham*, 1 Wils. 305; *Rez v. Smallpiece*, 2 Chitt. Rep. 288; *Rez v. Clear*, 4 B. & C. 899, 7 Dowl. & R. 393.

*93] *Dickenson v. Shee*, 4 Esp. N. P. C. 68, Lord *KENYON said, that, when there was a dispute as to the amount of the demand, the plaintiff, by objecting to the *quantum*, might dispense with the tender of the actual or any specific sum; but he adds, that there should, however, be an offer to pay, *by producing the money*, unless the plaintiff dispensed with the tender expressly, by saying the defendant need not produce the money, as he would not accept it; for, though the plaintiff might refuse the money at first, if he saw it produced, he might be induced to accept it. The production or non-production of the money could hardly be expected to operate on the mind of the overseer. In *Douglas v. Patrick*, 3 T. R. 683, where a debtor went with money in his pocket, and the creditor told him he need not give himself the trouble of offering it, for he would not take it, as the matter was in the hands of his attorney, Lord KENYON said, "It is no objection to this tender that the money was not *actually* produced; because what was said by one of the plaintiffs superseded the necessity of it." So, in *Thomas v. Evans*, 10 East, 101, Lord ELLENBOROUGH said, "The actual production of the money due in moneys numbered, is not necessary, if, the debtor having it ready to produce, and offering to pay it, the creditor dispense with it at the time, or do any thing which is equivalent to that." And in *Read v. Goldring*, 2 M. & Sel. 86, A., an agent of the debtor, met the creditor in the street, and told him he was desired by the debtor to offer him 4*l.*; the creditor said he would not take it: A. then said he would give him the other 10*s.* (which was claimed by the creditor) out of his own pocket, and run the risk of being repaid; and he pulled out his pocket-book, and told the creditor, that, if he would go with him into a neighbouring public-house, he would pay him; the plaintiff repeated that he would not take it; and this *94] was held a sufficient tender. Suppose here the party claiming to be rated had produced a sum more than sufficient to pay the rate, and desired the overseer to take what was due, would not that have been a sufficient tender? [MAULE, J. Clearly not, under the circumstances. The overseer cannot be expected, at a moment's warning, to be able to tell each rate-payer the amount due from him.] In *Bevans v. Rees*, 5 M. & W. 306, the plaintiff had a claim against the defendant on certain notes, amounting to about 108*l.*; there was a dispute between them as to the amount of a shop bill; the defendant's shopman went to the plaintiff's attorney, and said he came to settle for the notes, principal and interest, and wished to know what was due; and he put down one hundred and fifty sovereigns, and asked the attorney to take the principal and interest. The attorney said he would not take it, unless the shopman would consent to fix the shop account at a sum mentioned. The shopman said he would pay the notes without reference to the shop account, and desired the attorney to take the amount, which he refused to do; and this was held a sufficient tender. ALDERSON, B., said: "The tender in effect is, 'I will pay you what you say is due, if you will tell me; if not, take what is due.'" That is pre-

cisely this case; for, though the money was not actually produced, the claimant professed his readiness to pay the rate, if the overseer would tell him what was due.

Merevether, for the respondent, was stopped by the court.

TINDAL, C. J. It appears to me that the decision of the revising barrister was proper under the *circumstances of this case. The thirtieth section of the 2 W. 4, c. 45, provides that it shall be lawful for any person occupying certain premises, to claim to be rated to the relief of the poor, and that, upon the party so claiming, and *actually paying or tendering* the full amount of the rate or rates due in respect of the premises, the overseers shall put his name upon the rate for the time being; and that, in case the overseers shall neglect or refuse so to do, such occupier shall nevertheless be deemed to have been rated from the period at which the rate shall have been made. Now, it is perfectly clear that this party did not actually *pay* the rate in question; and it seems to me as clear that he did not actually *tender* the amount of the rate; for, when he called on the overseer, and inquired whether there were any rates due, upon the overseer saying he did not know, the claimant told him he was prepared to pay them, if any were due: to which the overseer replied, "I'll see to it:" and this was all that passed. The claimant seems to have left the overseer with a mutual understanding that he was to call again. Without, therefore, going into the two points raised by the case, it is enough to say that I think the barrister has come to a right conclusion. [*95]

MAULE, J. I also think the revising barrister came to a right conclusion in this case. The thirtieth section of the 2 W. 4, c. 45, enables occupiers not named in the rate, to claim to be rated; and provides, that, upon their actually paying or tendering the full amount of the rate or rates due in respect of the premises, though not in fact rated, they are to be deemed to be so for the purposes of the act. Here, there was no actual *payment* of the rate by the claimant: the only question is whether there was a *tender* within the meaning of the act. Without saying whether or not the same degree of precision and nicety are required in a tender under this *act as would be necessary to support a plea of tender, I think the claimant should at least show that he has done all that he reasonably could do towards payment. The claimant is to pay or to tender; and the overseer is to receive the rate. It seems to me that the overseer did all that he could reasonably be expected to do; but that the claimant did not conduct himself like one who was perfectly ready to pay. He went to the overseer, and he asked him whether there was any rate due; and received for answer, that which he might well have expected, viz., that the overseer did not know; for, it was very unlikely that he should recollect all the houses and the amount of rates, and whether they had been paid. The claimant then said, "If there are any, I am prepared to pay them." It was not absolutely necessary, perhaps, that he should actually exhibit the money. Upon the overseer replying "I'll see to it," that is, [*96]

"I will inquire as to the amount due," the claimant went away, and did not return. I think, under these circumstances, it is quite clear he did not do all that in him lay to pay the rate or to make a valid tender, and therefore that the barrister has decided rightly.

CRESSWELL and ERLE, Js., concurred.

Upon the application of *Merewether* for costs,

TINDAL, C. J., said there was so little doubt in the case that he thought the respondent was entitled to costs.

Decision affirmed, with costs.

*97]

*CITY OF LONDON.

JOHN HONOUR CROUCHER, Appellant, EDWARD BROWNE,
Respondent. Jan. 26.

Freemen and liverymen of London admitted freemen by *purchase* since the 1st of March, 1831, are entitled to be registered, notwithstanding the proviso in the 2 W. 4, c. 45, s. 32; such proviso applying not to liverymen of the city of London, but to freemen and burgesses of other cities and boroughs.

The court will not give costs upon an appeal, though only one side is heard, where a question of law, the fair subject of a doubt, is involved.

JOHN HONOUR CROUCHER duly objected to the name of Edward Browne being retained in the list of such of the freemen of London as are liverymen of the company of bakers, entitled to vote in the election of members for the city of London.

The revising barrister retained the name of the said Edward Browne, subject to an appeal to the court of Common Pleas upon the following case:—

The respondent was admitted to the freedom of the company of bakers, and to the freedom of the city of London, by redemption or purchase, in the month of January, 1834, and to the livery of the said company in the month of March following. His qualification was in other respects perfect.

On behalf of the appellant, it was contended, that, by the 2 W. 4, c. 45, s. 32, the respondent was disqualified, inasmuch as, having been admitted a freeman since the 1st of March, 1831, "otherwise than in respect of birth or servitude," he was not entitled to vote "as such."

The barrister decided that the words "as such," in the said section were limited to persons who voted as "burgesses" or "as freemen;" that the freemen and liverymen of London did not vote as *freemen*, but as *freemen and liverymen*; and, therefore, that a freeman and liveryman who had been admitted a freeman by purchase after the 1st of March, 1831, was not disqualified by the disfranchising proviso of that section.

*98] "If the court shall be of opinion that the said decision was wrong, the name of the respondent is to be expunged from the list of voters for the said company.

Kinglake, Serjt., (with whom was *Welsby*), for the appellant. Regard being had to the general object of the legislature, and to the language of the various sections of the reform act to which it will be necessary particularly to advert, it is plain that it was intended to exclude from the privilege of voting as such, all persons that might be elected or admitted burgesses or freemen after the 1st of March, 1831, otherwise than in respect of birth or servitude. The difficulty arises upon the proviso in the thirty-second section of the 2 W. 4, c. 45.(a) It will be contended, on the part *of the respondent, that the previous part of the section having [*99 preserved the existing rights of burgesses or freemen and freemen and liverymen, the proviso operates as a restriction applicable only to one class, viz. to those that are simply *freemen*. That clearly is not the true construction of the act. Corruption having been found to exist in many corporations by reason of the admission of honorary freemen and freemen by purchase—sometimes for the purpose of the particular election—the legislature intended to preserve the right of voting to such freemen only as were properly connected with the corporation. There is nothing in the act to show that London is to be excepted out of the protection thus afforded to corporations generally: it is within the restrictions in the earlier part of the clause, as to registration, residence, &c.; and there can be no reason why it should not be affected by the whole. It is only by reason of a corporate right that any freeman votes in the city of London, or in any other city or town corporate. The elective franchise was originally conferred on such voters by charter. It is only as members of the corporation, in respect of the freedom conferred on them by the corporation, that they can exercise the right. It is hardly necessary to state what a livery-

(a) The 32d section enacts, "that every person who would have been entitled to vote in the election of a member or members to serve in any future parliament for any city or borough not included in the schedule marked (A.) to this act annexed, either as a burgess or freeman, or, in the city of London, as a freeman and liveryman, if this act had not been passed, shall be entitled to vote in such election, provided such person shall be duly registered according to the provisions hereinafter contained; but that no such person shall be so registered in any year, unless he shall on the last day of July in such year be qualified in such manner as would entitle him then to vote if such day were the day of election, and this act had not been passed, nor unless, where he shall be a burgess or freeman, or freeman and liveryman, of any city or borough, he shall have resided for six calendar months next previous to the last day of July in such year within such city or borough, or within seven statute miles from the place where the poll for such city or borough shall heretofore have been taken, nor unless, where he shall be a burgess or freeman of any place sharing in the election for any city or borough, he shall have resided for six calendar months next previous to the last day of July in such year within such respective place so sharing as aforesaid, or within seven statute miles of the place mentioned in conjunction with such respective place so sharing as aforesaid, and named in the second column of the schedule marked (E. 2.) to this act annexed: Provided always, that no person who shall have been elected, made or admitted a burgess or freeman since the 1st of March, 1831, otherwise than in respect of birth or servitude, or who shall hereafter be elected, made, or admitted a burgess or freeman otherwise than in respect of birth or servitude, shall be entitled to vote as such in any such election for any city or borough as aforesaid, or to be so registered as aforesaid: Provided also, that no person shall be so entitled as a burgess or freeman in respect of birth, unless his right be originally derived from or through some person who was a burgess or freeman, or entitled to be admitted a burgess or freeman, previously to the 1st of March, 1831, or from or through some person who since that time shall have become, or shall hereafter become, a burgess or freeman in respect of servitude."

man is, as distinguished from a freeman of the city of London. He is a member of a chartered company. A man *may be a freeman of a particular company, and not a freeman of the city of London: he may also be a liveryman of a company, without being free of the city. The Scriveners' Company, for instance, have a jurisdiction extending a distance of three miles beyond the limits of the city; and it is not necessary that every freeman of that company should possess the freedom of the city. (a) Admission to the livery of a company has nothing to do with the corporate right. In some towns corporate, it was not enough to entitle a party to the elective franchise, that he should be a freeman; as, in Boston, where the right of election was in the mayor, alderman, common council, and freemen resident in the borough, paying scot and lot, such freemen claiming their freedom by birth or servitude. (b) So, to entitle *a party to vote as a freeman of the city of London, he must also be a liveryman: but that is something superadded to his qualification to vote as a freeman. The election of corporate officers is in general regulated by the by-laws of the corporation (c): but, in London, the right of voting in the election, as well of corporate officers as of members of parliament, is regulated by the statute 11 G. 1, c. 18, which, after reciting that "of late years great controversies have arisen in the city of London, at the elections of citizens to serve in parliament, and of mayor, aldermen, sheriffs, and other officers of the said city, and many evil-minded persons having no right of voting have unlawfully intruded themselves into the assemblies of the citizens, and presumed to give their votes at such elections, in manifest violation of the rights and privileges of the citizens, and of the freedom of their election, and to the disturbance of the public peace," &c., provides that members of parliament and certain civic functionaries shall be elected "by the liverymen." The oath by that act prescribed to be taken by voters upon the election of members of parliament for the city, is as fol-

(a) Reference was made to the examination of the clerk to the Scriveners' Company, before the Municipal Corporation Commissioners, in the year 1834, in which the following question and answer occur:—

"Question.—Are all the freemen of the company free of the city of London? How many are not so? Are any steps taken by the company to induce or compel its members to take up the freedom of the city? Are any steps taken by the city to compel the freemen of the company to become free of the city? Are there any freemen of the company who are not qualified to become free of the city? If so, explain out of what difference in the laws of the company and city the disqualification for the civic freedom arises.

"Answer.—Some of the freemen of the company are not free of the city of London. The number of such is not known. No steps are taken by the company to induce or compel its members to take up the freedom of the city; nor is it known that any steps are taken by the city to compel the freemen of the company to become free of the city. The freemen of the company, it is presumed, are for the most part qualified to become free of the city by purchase; but, as the jurisdiction of the company extends beyond the limits of the city, many persons are compelled to take up their freedom of the company who are not under any obligation to become free of the city."

See also the second report of the Municipal Corporation Commissioners, 1837, part 2, p. 219. And see *The Poulterers' Company v. Phillips*, 6 Bingh. N. C. 314, 8 Scott, 593, and the cases there referred to.

(b) *Shepherd on Elections*, 2d edit., p. 38.

(c) *Simeon on Elections*, p. 100.

lows:—"You do swear that you are a *freeman* of London, and a *liveryman* of the company of ———, and have so been for the space of twelve calendar months," &c.: and that prescribed for the election of aldermen and common councilmen, as follows:—"You do swear that you are a *freeman* of London, and a *householder* in the ward of ———," &c. Two classes of voters, therefore, are recognised, viz. freemen and liverymen, and freemen and householders: both, however, voting in respect of their freedom. By the 3 G. 3, c. 15, s. 1, it is enacted that no person whatsoever claiming as a freeman to vote at any election of members to serve in parliament for any city, &c., wheresuch voter's right of *voting [102 is as a *freeman* only, shall be admitted to give his vote at such election, unless such person shall have been admitted to the freedom of such city, &c., twelve calendar months before the first day of such election, under a penalty of 100*l*. That is precisely the language of this act: and, if the barrister is right in holding that the freemen and liverymen of London do not vote as *freemen*, but as *freemen and liverymen*, that provision could not apply to London; and yet the legislature thought it necessary (by s. 8) expressly to enact that it should not apply to that city or to the city of Norwich; the reason of the exemption being that similar provisions had already been enacted as to those two places—as to the former, by the 11 G. 1, c. 18, already referred to—and, as to the latter, by the 3 G. 2, c. 8. [MAULE, J. There are other sections in the 3 G. 3, c. 15, that might apply to London: s. 4, for instance, as to the inspection of books, &c.] The true meaning of the words "as such," in the thirty-second section of the 2 W. 4, c. 45, is, "in respect of the freedom." The party may have a qualification as a 10*l*. householder. In *Daman v. Marrett*, 1 Taunt. 128, it was held that the offence prohibited by the 3 G. 3, c. 15, was, the voting as a freeman, not having been twelve months admitted, and not having any other right of voting than that which the character of a freeman confers; and that the offence must be so averred in declaring for the penalty. So, here, the words "shall be entitled to vote as such," are confined to a voting as a freeman, having no other qualification. In *Williams v. Evans*, 8 T. R. 246, which was an action for a penalty under the same statute, it appeared that the mayor and common council of the borough of Carmarthen had power to admit to the freedom of the borough, as burgesses, such of the inhabitants paying scot, and bearing lot, as *had, for [103 three years previously, rented lands within the borough for which they had payed 10*l*. a year, and that the defendant, as an inhabitant of that description, was nominated a burgess accordingly; and it was held that a burgess so appointed was within the statute, and that the defendant, having voted within twelve months after he was sworn in, was liable to the penalty of 100*l*. imposed by the act, although he had been nominated to be a burgess more than six years before. [ERLE, J. The party there voted as a freeman only, and not as an inhabitant paying scot and lot. CRESSWELL, J. It was not necessary in that case that a burgess, to be

entitled to vote, should continue to pay scot and lot: he would not, therefore, be a scot and lot voter. Here, however, the voter must be a liveryman as well as a freeman; he could not vote if he ceased to be on the livery. The cases, therefore, are not parallel.] It is as a member of the corporation that the party votes, not as a freeman only: livery, like residence within seven miles of the city, is but a condition annexed to the exercise of the right. The object of the legislature was, to exclude from voting all who had acquired their freedom by purchase since the 1st of March, 1831. The forty-eighth section of the 2 W. 4, c. 45, enacts, "that, for providing a list of such of the freemen of the city of London as are liverymen of the several companies entitled to vote in the election of a member or members to serve in any future parliament for the city of London, the returning officer or officers of the said city shall, on or before the last day of July in the present and in each succeeding year, issue precepts to the clerks of the said livery companies, requiring them forthwith to make out or cause to be made out, at the expense of the respective companies, an alphabetical list, according to the form in the schedule (K.) to this act annexed, of the *freemen* of London, *being liverymen* of the respective companies, *and entitled to vote in such election, &c. &c. ; *104] and the returning officer or officers shall take the poll or votes of such *freemen* of the said city, *being liverymen* of the several companies, as are entitled to vote at such election," &c. And schedule (K.) is headed "A list of such of the freemen of London as are liverymen of the company of ———, entitled to vote in the election of members for the city of London." This provision is repeated in the same words, in s. 20 of the 6 & 7 Vict. c. 18, and the schedule (C.) No. 1. [MAULE, J. All the other forms, except the notice of claim to be inserted in the list of liverymen, speak of voting as freemen *and* liverymen, and not, as you contend, as *freemen* only.] The act clearly intended to create no new right. [MAULE, J. The thirty-second section of the 2 W. 4, c. 45, was intended to carry out the same view as the ninth section of the 2 & 3 W. 4, c. 88. I am at a loss to conceive how any doubt could have existed.] The 5 & 6 W. 4, c. 36, s. 7, speaks of "such of the *freemen* of the city of London, *being liverymen*, as are entitled to vote," &c.

The proviso in the 2 W. 4, c. 45, s. 32, is, "that no person who shall have been elected, made, or admitted a burgess or freeman since the 1st of March, 1831, otherwise than in respect of birth or servitude, or who shall hereafter be elected, made, or admitted a burgess or freeman, otherwise than in respect of birth or servitude, shall be entitled to vote, *as such*, in any such election for any city or borough as aforesaid, or to be so registered as aforesaid." That refers to the registration as a burgess or freeman, or, in the city of London, as a freeman and liveryman, and is not confined to freemen only. The effect of the proviso is, that no person admitted a freeman, otherwise than by birth or servitude, since the day mentioned, can be registered as a freeman and liveryman. [MAULE, J.

*You contend that a party may be entitled to vote, and yet may not be entitled to be registered. CRESSWELL, J. You must, to sustain this branch of your argument, contend that a 10*l.* householder who has acquired his freedom by purchase since the 1st of March, 1831, is not entitled to be registered.] The proviso has no reference whatever to 10*l.* householders. [*105]

Gurney, (with whom was *Merewether*,) for the respondent, was not called upon.

TINDAL, C. J. The question in this case turns upon the proper construction to be put upon the thirty-second section of the 2 W. 4, c. 45, which I think it is impossible to read without noticing the marked distinction therein between burgesses and freemen of boroughs or cities generally, and freemen and liverymen of the city of London. When speaking of boroughs or cities other than London, the expression is, "burgess or freeman," in the alternative: but, when speaking of London, it is in the conjunctive, "freeman *and* liveryman;" coupling the character of freeman with that of liveryman, and making the right of voting depend upon the twofold qualification: and this distinction is maintained throughout the whole of the section. It begins with enacting "that every person who would have been entitled to vote in the election of a member or members to serve in any future parliament for any city or borough not included in the schedule marked (A.) to this act annexed, either as a burgess or freeman, or in the city of London, as a freeman *and* liveryman, if this act had not been passed, shall be entitled to vote in such election, provided such person shall be duly registered according to the provisions hereinafter contained;" not meaning to point to the proviso in this section, but to the general provisions for registration *contained in the act. The clause then goes on—"but that no such person shall be so registered in any year, unless he shall, on the last day of July in such year, be qualified in such manner as would entitle him then to vote if such day were the day of election, and this act had not been passed, nor unless, where he shall be a burgess or freeman, or freeman *and* liveryman of any city or borough, he shall have resided for six calendar months next previous to the last day of July in such year within such city or borough, or within seven statute miles from the place where the poll for such city or borough shall heretofore have been taken." Then follows a clause relating to places other than London, where the expression burgess or freeman is again used—"nor unless, where he shall be a burgess or freeman of any place sharing in the election for any city or borough, he shall have resided for six calendar months next previous to the last day of July in such year within such respective place so sharing as aforesaid, or within seven statute miles of the place mentioned in conjunction with such respective place so sharing as aforesaid, and named in the second column of the schedule marked (E. 2) to this act annexed." We now come to [*106]

the proviso upon which the question mainly turns; and there we find the same distinction prevailing:—"Provided always, that no person who shall have been elected, made, or admitted a burgess or freeman since the 1st day of March, 1831, otherwise than in respect of birth or servitude, or who shall hereafter be elected, made, or admitted a burgess or freeman, otherwise than in respect of birth or servitude, shall be entitled to vote as such in any such election for any city or borough as aforesaid, or to be so registered as aforesaid." Why are we to give to this disfranchising exception a construction that would apply it to the case of freemen and *107] liverymen of the city of London, *when that construction would be inconsistent with the distinction that pervades the earlier and enacting part of the section? If we call in aid the forms given in schedule (K.), we find the same distinction there: see the forms Nos. 2 and 3. It appears to me, therefore, that the revising barrister came to a sound determination when he held that the words "as such" in the proviso in question are limited to persons voting as "burgesses or freemen," and do not extend to those claiming as "freemen *and* liverymen" of the city of London. It certainly is not easy to say why such a distinction should be made in favour of London. It may have been considered that the numerous and conflicting interests of the chartered companies in London would sufficiently guard against the mischiefs the provision was levelled at in other corporations. But, be that as it may, I am of opinion that the decision of the revising barrister was correct, and must be affirmed.

MAULE, J. I also am of opinion that the revising barrister was right in the construction he has put upon the thirty-second section of the 2 W. 4, c. 45; and I cannot say that the very able and ingenious argument of my brother *Kinglake* has, for a moment, induced me to hesitate. It is impossible to handle the statutes 2 W. 4, c. 45, and 6 & 7 Vict. c. 18, without turning up something to show the appellant's construction to be destitute of foundation. Whether we look at the spirit of the reform act, or at the words in which the spirit is imbodyed, there is no room for doubt. The object was, to prevent the repetition of the corrupt practices that had before existed in certain boroughs, of making, on some particular occasion, a large number of new voters for the purpose of swamping the old constituency. This provision was therefore intended to apply to those cases *108] where the corporation who had to return the members, *had also the power to create voters. But, in the case of London, the corporation has not the power of creating voters: the right to vote arises from the act of the various companies admitting freemen to be of their livery: the statute did not intend to interfere with those rights. And the way in which the intention of the legislature has been carried out is, by language that appears to me to be (reading the words in their ordinary sense) perfectly plain and unequivocal. The general scope of the thirty-second section seems to me to account sufficiently for the omission, in the disfranchising proviso, of liverymen who are mentioned in the earlier parts

of the clause. It is done deliberately. Taking the text of the act of parliament to be well established, it comes simply to this: the earlier part of the section provides "that every person who would have been entitled to vote in the election of a member or members to serve in any future parliament for any city or borough not included in schedule (A.), either as a burgess or freeman, or, in the city of London, as a freeman *and* liveryman, if this act had not been passed, shall be entitled to vote in such election, provided such person shall be duly registered according to the provisions hereinafter contained:" and the same distinction between those entitled to vote as burgesses or freemen of other cities or boroughs, and those entitled to vote as freemen *and* liverymen of London, pervades the whole act. Then, it is said that that right is restricted by the proviso "that no person who shall have been elected, made, or admitted a *burgess or freeman* since the 1st of March, 1831, otherwise than in respect of birth or servitude, or who shall hereafter be elected, made, or admitted a *burgess or freeman*, otherwise than in respect of birth or servitude, shall be entitled to vote *as such* in any such election for any city or borough as aforesaid, or to be so registered as aforesaid." The words "as" [*109 "such" evidently refer to "burgess or freeman," keeping up the distinction already adverted to. If, indeed, it could be said, that in London the voters could be strictly and properly described as voting *as freemen only*, there might be some foundation for the argument: but, throughout the act, the legislature has, deliberately and repeatedly, described the parties to vote in London, as "freemen *and* liverymen." I think, therefore, we should be doing the greatest violence to the act, if we were to hold this proviso to be applicable to the city of London.

Then, it is contended, that, assuming the proviso not to have directly and immediately taken away the right of *voting* from persons circumstanced like the respondent in this case, it has done so indirectly and circuitously, by saying that they shall not be entitled to be *registered*. The words, however, are perfectly plain: the proviso says that certain parties shall not be entitled to vote or to be registered as burgesses or freemen. Upon the whole, I think there is no ground for saying that there is any obscurity in the clause, but, on the contrary, it appears to me that the legislature has used words that are perfectly plain, and adequate to the purpose in view.

CRESSWELL, J. I am entirely of the same opinion. The thirty-second section begins with saying that every person (with certain exceptions) entitled, before the passing of the act, to vote "either as a burgess or freeman, or, in the city of London, as a freeman and liveryman," shall vote, "provided such person shall be duly registered according to the provisions hereinafter contained." Now, in order to be entitled to vote as a burgess or freeman, or as a freeman and liveryman of the city of London, the party must be registered as entitled to vote in that particular capacity. Then it goes on—"but no such person shall be so registered in any year, unless

*110] he shall, on the last day of July in such year, be *qualified in such manner as would entitle him then to vote, if such day were the day of election, and this act had not been passed; nor unless, where he shall be a burgess or freeman, or freeman and liveryman of any city or borough, he shall have resided for six calendar months next previous to the last day of July in such year within such city, or within seven statute miles," &c., "nor unless, where he shall be a burgess or freeman of any place sharing in the election for any city or borough, he shall have resided," &c. That provision does not touch the manner in which parties may be entitled to become "burgesses or freemen" or "freemen and liverymen." Then comes the proviso that is supposed to affect that question:—"Provided always, that no person who shall have been elected, made, or admitted a *burgess or freeman* since the 1st day of March, 1831, otherwise than in respect of birth or servitude, or who shall hereafter be elected, made, or admitted a *burgess or freeman*, otherwise than in respect of birth or servitude, shall be entitled to vote *as such* in any such election for any city or borough as aforesaid, or to be so registered as aforesaid." These words "as such" clearly refer to "burgesses or freemen," and not to those claiming to vote as "freemen and liverymen" of the city of London. It is then said, that, at all events, the party is not entitled to be *registered*. That, however, cannot be: he is not to vote or to be registered as a burgess or freeman; but that does not deprive him of the right to be registered in respect to any other qualification. I think there is no ground whatever for contending that the decision of the revising barrister was wrong.

ERLE, J. I am of the same opinion. Throughout the reform and registration acts, two species of qualification in respect of corporation voters *111] are recognised—the one, consisting of the compound character of freeman and liveryman, in the city of London—the other, of that of burgess or freeman in any other city or borough. The legislature imposes certain restrictions upon this right upon both classes, and certain other restrictions that are applicable to one class only. The proviso, as well as to the right to vote, as to the right to be registered, clearly applies to persons claiming as "burgesses or freemen" only.

Gurney applied for costs against the appellant.

MAULE, J. (a) This case involved a question of law, and therefore I think no costs should be allowed. In *Bishop*, app., *Smedley*, resp., ante, p. 90, the question was one purely of fact. Decision affirmed.

(a) Tindal, C. J., was absent.

CITY OF LONDON.

WILLIAM BUSHELL, Appellant, WILLIAM ENDELL LUCKETT,
Respondent. Jan. 26.

A rate is not a complete and valid rate until allowance and publication.

A rate was made on the 28th of September, 1844, and purported to be made "for thirteen weeks, from the 16th of September to the 16th of December." A new rate was made on the 23d of December, 1844, allowed on the 3d of January, 1845, and published on the 5th: *Held*, that a claim under the 2 W. 4, c. 45, s. 30, made on the 27th of December, to be put upon "the rate for the time being," was a claim to be put on the rate made in September.

WILLIAM ENDELL LUCKETT duly objected to the name of William Bushell being retained on the list of persons entitled to vote in the election of members for the city of London, in respect of the *occu- [*112
pation of a house, No. 1 Still Alley, in the parish of St. Botolph,
Bishopsgate.

The barrister expunged the name of the said William Bushell from the said list, subject to an appeal to the Court of Common Pleas upon the following case:—

The qualification of the appellant was duly proved in all respects, except as to the sufficiency of the rating. The poor rates in the said parish are made under a local act, 35 G. 3, c. 61, by s. 16, of which "the rector, churchwardens, overseers of the poor, and inhabitants of the said parish, are authorized and required to assemble and meet together in the vestry-room of the said parish, on the 25th of June, 1795, and from time to time for ever thereafter quarterly, or oftener, in every year, as occasion shall require, due notice having been given, &c.; and they, or the major part of them so assembled, shall from time to time make such rate or rates, assessment or assessments, for paying the interest due on certain annuities, and for and towards the relief of the poor of the said parish, or for other the purposes of this act, upon all and every person or persons who do or shall inhabit, &c. &c., as they the said rector, &c., at such meeting shall think necessary and proper to be rated and assessed," &c.

Four rates were made in the said parish, between the 31st of July, 1844, and the 31st of July, 1845. The first rate was made on the 28th of September, 1844, allowed on the 4th of October following, and published on the 6th. That rate was headed as follows:—

"We, the rector, &c., being assembled and met together this 28th day of September, 1844, in the church of the said parish, due notice having been given of such meeting, do hereby make the following rate or assessment, being 10½d. in the pound, upon all and every person or persons who do or shall inhabit, &c. &c., (*following the words of the [*113
act,) for thirteen weeks, from the 16th of September to the 16th
of December, 1844."

The second rate was made on the 23d of December, 1844, was allowed

on the 3d of January, 1845, and published on the 5th. This last-mentioned rate had a heading similar in form to that of the rate first mentioned, being made "for thirteen weeks, from the 16th of December, 1844, to the 17th of March, 1845."

The dates of the other two rates are not material: they were each headed in a similar manner, and purported to be made for thirteen weeks respectively.

Each rate, though it purported to be made on a particular day, was not, in fact, made out as to the assessment of the different parties included therein, till some days afterwards.

The appellant was not assessed to the first-mentioned rate, nor did his name appear thereon; but, at the end of the rate, after the allowance thereof, there was a long list of names, including that of the appellant; which list was headed thus:—"The following are the names of persons who have made claim to be rated since the completion of the foregoing rate."

It was not proved that any claim to be rated was made by the appellant before the 27th of December, 1844; but on that day, a notice of claim was served, on his behalf, on one of the overseers. The claim was in this form:—

"To the overseers of the parish of St. Botolph, Bishopsgate.

"I hereby give you notice that I occupy a house at No. 1 Still Alley, Bishopsgate Street, in your parish; and I claim to have my name inserted as occupier thereof, in the rates made to the relief of the poor in your
*114] parish, pursuant to the 6 & 7 W. 4, c. 96, and to *the English reform and parliamentary registration acts. Dated, &c.

(Signed)

"WILLIAM BUSHELL,

"residing at No. 1 Still Alley."

The said claim was served at the same time with several others; and, at the time of such service, the overseer was told that the names of the parties so claiming ought to be put upon the September rate; in consequence whereof, the names were so inserted in the before-mentioned list, at the end of the September rate-book.

The appellant was duly rated to the rate made on the 23d of December, 1844, and other subsequent rates..

On behalf of the appellant, it was contended, that, at the time the said claim to be rated was so made as aforesaid, the September rate was "the rate for the time being" within the thirtieth section of the 2 W. 4, c. 45; and, therefore, that the appellant must be deemed to have been rated to that rate.

The revising barrister decided that the September rate was not the rate for the time being at the time when the said claim to be rated was so made as aforesaid.

If the court shall be of opinion that the decision was wrong, the name of the appellant is to be re-inserted in the said list of voters.

The cases of thirteen other persons, the validity of the objections against whom depended upon the same point, were consolidated with the above.

Welsby, for the appellant. The rate made on the 28th of September, 1844, and allowed on the 4th of October following, and published on the 6th, was "the rate for the time being," within the 2 W. 4, c. 45, s. 30, ante, p. 91. That section intended to give parties a right *to claim to be rated at any time, and contemplated the continued [*115 existence of poor-rates throughout the year. The rate has no legal existence until allowance and publication; therefore, the thirteen weeks of its duration must be reckoned from the day of publication. The rate made on the 23d of December, 1844, was not allowed until the 3d of January, 1845. At the time the claim was made, therefore, that rate did not legally exist. "The rate for the time being" must mean the rate then in force, or those words must be relaxed, and be held to mean, the last rate made for the parish. The September rate (a) must, at all events, be in force, for the purpose of collecting the arrears.

W. R. Grove, for the respondent. The appellant has not brought himself within the thirtieth section of the reform act. In *Wansey*, app., *Perkins*, resp., (b) it was held, that a claim to be rated under this section is good only for the single rate at that time in force. [MAULE, J. That case assumes that there always is a rate for the time being. A rate ceases to be the rate for the time being, when a new one is made. The question here is, when did the September rate cease to be "the rate for the time being."'] Where a rate is made generally, it will, of course, remain in force, until superseded by a new one; but it is otherwise where, as here, the rate is made for a specific time. The claim here was subsequent, in point of date, to the making of the rate of the 23d of December, and, therefore, it enured as a claim to be put upon the last-mentioned rate. [TINDAL, C. J. The claim, though subsequent to the *making [*116 of that rate, was before its allowance.] The rate of the 28th of September was a non-existing rate after the 23d of December. [TINDAL, C. J. When the party made his claim, he could not know of the making of the December rate.]

Welsby was heard in reply.

TINDAL, C. J. The rate in question was made on the 28th of September, allowed on the 4th of October, and published on the 6th; and it professes to be made "for thirteen weeks, from the 16th of September to the 16th of December;" the object being to make a provision to meet the exigencies of one quarter. The question is, whether, after that quarter is ended, and before a new rate is made and perfected by allowance and publication, the rate so made was "the rate for the time being" within the thirtieth section. It seems to me that it does satisfy the words of the

(a) This observation would apply to all preceding rates in respect of which any arrears remained to be levied.

(b) *Lockey's case*, 7 M. & G. 145; 8 Scott, N. R. 970.

act. If the parish officers had to justify a distress for arrears, made in the interval, it must be under that as the existing rate. It never was intended, in a case like this, that, because the time had expired for which the rate was made, the rate itself must be held to have expired.

MAULE, J. I also am of opinion that "the rate for the time being" does not exclude the rate in question. The thirtieth section entitles the party occupying any house, &c., in any parish or township in which there shall be a rate for the relief of the poor, to claim to be rated in respect thereof; and, upon his so claiming, and paying or tendering the amount of rates due, the overseers are required to put his name upon the rate for the time being; and it provides, that, in case of their refusal or neglect so *117] to do, he shall be deemed *to have been rated to such rate. That assumes that there always is a rate for the time being in every parish. In fact there always is a rate existing. It has all the qualities of a rate at the time of its conclusion, as it had at its commencement. The words of the thirtieth section equally exclude the idea of there being two existing rates, as that of there being no rate existing. When a rate is once made, it exists until superseded by another duly made, allowed, and published. The party has always a right to be on some rate. It is said he should have claimed to be put on the rate made upon the 23d of December, an incomplete rate, and not on that which was the last complete rate. I think, however, the rate inchoately made in December, was not "the rate for the time being" within the act; and, consequently, that the demand was properly made, and the decision of the revising barrister was wrong.

CRESSWELL, J. I also am of opinion that "the rate for the time being" means the last valid and binding rate. A rate once made continues to exist until quashed, or until superseded by a new rate duly made, allowed, and published, so as to be effectual and binding upon the parishioners. Here, the rate made on the 28th of September was the only complete and valid rate at the time the claim was made. A claim, therefore, to be put upon that rate was a claim to be put on "the rate for the time being."

ERLE, J. A rate expressed to be made for a specific time, merely means a rate that is calculated and intended to meet the exigencies of the parish for that period, not that it shall cease to be an existing rate when the time has elapsed. A rate is not a valid and complete rate *118] until it is allowed and published. At the *time the claim in question was made, the September rate was, in my opinion, the rate for the time being. Decision reversed.(a)

(a) If the rate had, by reason of the words "to the 16th of December following," ceased to exist as a rate on that day, it would follow that no valid claim to be put upon any rate could have been made between that period and the allowance of a succeeding rate.

COUNTY OF CHESTER, SOUTHERN DIVISION.

EDWARD BAYLEY, Appellant, The Overseers of the Township of
NANTWICH, Respondents. Jan. 29.

The production of a stamped duplicate notice of *claim*, duly delivered to the postmaster, and duly directed to the overseers, pursuant to the 6 & 7 Vict. c. 18, ss. 100, 101, is sufficient evidence of the notice of claim having been given to the overseers at the place mentioned in such duplicate, on the day on which such notice would, in the ordinary course of post, have been delivered at such place—notwithstanding its actual delivery to the overseer is delayed until after the time limited by the act, in consequence of pressure of business at the post-office.

EDWARD BAYLEY claimed to be entitled to vote in respect of property situate within the township of Nantwich, in the southern division of the county of Chester.

The claimant, as did also twenty-four other claimants, (whose cases were identical and were consolidated therewith,) resided at Nantwich. A notice of claim, purporting to be signed by him, was duly proved to have been posted at Manchester on the 19th of July. This notice of claim, according to the ordinary course of post, should have arrived at Nantwich, and been delivered to the overseers, on the 20th of July. It was not, in fact, delivered till the 22d. The notice of claim, which was produced, bore the Nantwich post-mark of the latter day.

The overseers of Nantwich published the names, with *this note:—The whole of these claims, in consequence of negligence at the post-office, were not delivered until after the specified time.” [*119]

The revising barrister examined the postmaster of Nantwich, who proved that the notices of claim only arrived from Manchester on the 22d of July, and that he had caused them to be delivered immediately, and was free from all blame. It appeared that all the twenty-five claimants might have delivered their notices of claim, personally, in due time; and that one of them denied all knowledge of his claim having been made.

There was no proof of the cause of detention at Manchester. As the transmission of *notices of objection* had been proved to have been delayed several days by reason of their vast numbers, it was contended that the multiplicity of *claims* had also caused the delay; but of this there was no legal evidence. None of the claimants were examined.

The barrister held that the claims were not duly made or transmitted.

If the court shall be of opinion that he was in error, the register is to be amended by adding the name of Edward Bayley, together with the names of the twenty-four other claimants, in the same situation with Bayley, according to an annexed list.

The case was argued on the 19th instant.

Cockburn, (with whom was Kinglake, Serjt.,) for the appellant. The question raised in this case, is similar to that already decided in *Bishop, app., Helps, resp.*, antè, p. 45, save that that was a notice of *objection*,

this a notice of *claim*. But the 101st section of the 6 & 7 Vict. c. 18,(a) which, by reference, incorporates within it all the provisions of the 100th *120] section,(a) enacts, “that wherever *by this act, any notice is required to be given or sent to any person or persons whatsoever, or public officer, it shall be sufficient if such notice be sent by the post, in the manner and subject to the regulations hereinbefore provided, with respect to sending notices of objection by the post, free of postage, or the postage thereof being first paid, addressed, with a sufficient direction, to the person or persons to whom the same ought to be given or sent, at his or their usual place of abode.” [MAULE, J. I suppose we are to assume, the case being silent on the subject, that these notices were properly addressed.] The only question intended to be raised was, as to the period of delivery. [MAULE, J. At the common law, putting a letter into the post would be *prima facie* evidence of its delivery, in due course—subject to be rebutted. But s. 100 says, that, in certain cases, it shall be *sufficient* if the notice of objection be sent by the post, free of postage, or the sum chargeable as postage for the same being first paid, directed to the person to whom the same shall be sent, at his place of abode as described in the list of voters. The clause then goes on to prescribe the manner of sending by the post; and, these directions being complied with, the production of the stamped duplicate is to be evidence of the notice having been given. All that is incorporated into s. 100. In order to bring himself within that provision, it will be said to be necessary to show, not only that the notice was duly posted, but that all the other requisites of s. 100 have been properly complied with. As to all these, the case is silent.] The revising barrister evidently intended it to be inferred, that all these provisions had been complied with. He finds that the notice of claim was *duly* proved to have been posted at Manchester on the 19th of July. [CRESWELL, J. The word “duly” is put in the wrong place.]

*121] **Welsby*, for the respondent. The case is defective in other respects. It states, that a notice of claim, “purporting to be signed by the claimant,” was duly proved to have been posted. [ERLE, J. All that we have to deal with is, the question that the barrister intended to decide.] He holds distinctly, that the claims were not duly made or transmitted. He does not find that the notices were posted post-free, or that the provisions of s. 100 have, in any respect, been complied with. [TINDAL, C. J. I think we ought to refer it back to the revising barrister to state what was the particular question of law intended to be raised for our decision.]

The case was accordingly remitted to the barrister, who on a subsequent day returned it with the following amended statement:—

“The only question intended to be submitted to the court was, whether, taking the sections 100 and 101 of the 6 & 7 Vict. c. 18, together, the

production of the stamped duplicate of notice of claim, duly delivered to the postmaster, and duly directed to the overseers of Nantwich, was to be held *conclusive* evidence of the notice of claim having been given to the overseers, at the place mentioned in such duplicate, on the day on which such notice would, in the ordinary course of post, have been delivered to such place. It was admitted that all the provisions in sections 100 and 101, as to sending notices by the post, had been complied with. The sole difficulty that presented itself to my mind was, whether, under the circumstances, the duplicate notice of claim was *conclusive* evidence of the claim being in time: and this the Court of Common Pleas has since decided in the affirmative.” (a) *Cur. adv. vult.*

*TINDAL, C. J. This case has been referred back to the revising barrister to certify whether any objection was made before [•122 him as to the address of the notice of claim to the overseers of Nantwich being the proper address; and he has certified to us that no such objection was made—that it was admitted that all the provisions in ss. 100 and 101 of the registration act had been complied with, and that the sole point referred to us was, whether the duplicate notice of claim, properly stamped, was sufficient evidence of the claim being in time. This point was decided in the case of a notice of objection; (a) and we think there is no distinction to be taken, in this respect, between a notice of objection and a notice of claim.

We therefore think the decision of the revising barrister is wrong, and that the same must be reversed, and the names of the twenty-five claimants placed on the register. Decision reversed.

(a) *Bishop, app., Helps, resp., antè, p. 45.*

YORKSHIRE, WEST RIDING.

EDWARD NELSON ALEXANDER, Appellant, EDWARD NEWMAN,
Respondent. Jan. 29.

A conveyance of land by one vendor to several vendees for a *bonâ fide* consideration, is valid, although the avowed object of the vendor is to multiply, and that of the vendees to acquire the right of voting.

JOSEPH BOTTOMLEY and thirty-four other persons claimed to have their names inserted in the register of voters for the township of Lockwood, in the polling district of Huddersfield, in the west riding of *the [•123 county of York, as the several owners, each respectively of one undivided thirty-fifth part, of freehold land and buildings there situated.

The facts applicable to each case, were as follow:—

Joseph Bottomley, being desirous of obtaining a qualification to vote in the election of members to serve in parliament for the said riding, some time in the month of January, 1845, called upon J. R., the agent of a

political association in the town of Huddersfield, and requested the said J. R. to obtain a vote for him, the said Joseph Bottomley. Joseph Bottomley wished to obtain the qualification as cheaply as he could; but did not care about the nature or situation of the property, provided it would confer the right of voting, and did not involve an outlay of money beyond what would give the qualification, and at the same time secure the ordinary rate of interest. Joseph Bottomley's motive in applying to J. R. was not, however, the investment of money in land or buildings, but only to acquire the right of voting.

Some time in the same month of January, Messrs. C., being wealthy manufacturers in the neighbourhood of Huddersfield, authorized the said J. R. to sell for them certain lands and cottages, their property, for the sum of 1400*l*. The only object of Messrs. C. in so authorizing the said J. R. to act for them, was, to increase the number of voters for members to serve in parliament for the said riding. They were not in want of money, and would not have sold any portion of their real estate below its fair and reasonable value. J. R. was not the attorney generally employed, either by Messrs. C. or by Joseph Bottomley; but, as agent to the before-mentioned association, he had previously caused advertisements to be inserted in the public papers inviting parties either to sell or *124] purchase small freeholds for the *purpose of qualifying voters for the said riding, and referring to himself as such agent.

In consequence of such authority from the said Messrs. C., and of such instructions from Joseph Bottomley, and many other parties similarly disposed, the said J. R. arranged the purchase and sale of the said lands and cottages by the said Messrs. C. to the said Joseph Bottomley and thirty-four other persons, as tenants in common, for the sum of 1400*l*. A deed conveying the said land and cottages was accordingly prepared by the said J. R., and was duly executed by the said Joseph Bottomley on the 22d of January last; on which occasion the said Joseph Bottomley paid his portion of the purchase-money, viz., 40*l*., to the said J. R., for and on behalf of Messrs. C., together with 1*l*. towards J. R.'s bill of costs.

On the same 22d of January, a lease of the land and cottages in question was executed by Joseph Bottomley and the thirty-four other tenants in common, to the said Messrs. C., for the period of fifteen years, at the annual rent of 70*l*., which rent has since been duly paid. The land and cottages are within a very short distance of Messrs. C.'s mill, and were before and at the time of the purchase, and still are, in the occupation of persons employed by the said Messrs. C. in the said mill.

Joseph Bottomley has never seen the property in question; and he stipulated, when he applied to J. R. on the subject, that he (Joseph Bottomley) was to have no trouble in the matter, but should receive 40*s*. per annum for his 40*l*., and secure the right of voting.

The conveyance was complete and *bonâ fide*, the purchase-money really paid by the said Joseph Bottomley and the several other purchasers, and

there was no secret trust or reservation in favour of the sellers, nor any stipulation as to the mode in which the elective *franchise should be exercised by the said thirty-five purchasers, or any of them, [*125 nor had any of them any communication with Messrs. C., save through their common solicitor, J. R.

The said Messrs. C. and the thirty-five other persons entertain the same political opinions; and, though there was no immediate concert between them, the avowed and only object of the transactions on both sides was, to multiply voices in the election of members of parliament for the said riding.

Upon these facts the claims of the said Joseph Bottomley and the thirty-four other persons to have their names inserted in the said list of voters, were opposed, on the ground that the case came within the statute 7 & 8 W. 3, c. 25, commonly called the splitting act, as being a conveyance made "in order to multiply voices," or to split and divide the interest in houses or land among several persons, to enable them to vote at elections of members to serve in parliament, and therefore void and of none effect.

The revising barrister decided that the statute did not apply to conveyances made under the circumstances disclosed in the foregoing statement of facts; that no conveyance of an estate for an adequate consideration, made *bond fide*, without reservation, ratified according to law, and accompanied by payment of the purchase-money on the one hand, and possession of the property or receipt of the rents, as in this case, on the other, can afterwards be nullified by an inquiry into the motives which may have actuated the contracting parties before or at the time of the transaction; and that the said Joseph Bottomley and the said thirty-four other claimants were entitled to have their names retained in the list of voters for the said riding in respect of their several and respective shares in the said freehold land and buildings.

*The cases of sixteen other persons similarly circumstanced [*126 were consolidated with the principal case.

Annexed to the case is a copy of the list of claimants, the form of which is as follows:—

Christian Name and Surname, &c.	Place of Abode.	Nature of the supposed Qualification.	Street, &c., where Property situate, &c.
Bottomley, Joseph.	No. 40 Westgate, Huddersfield.	Freehold land and buildings, one undivided thirty-fifth part thereof.	Cobden's Row, Crossland Moor, Lockwood, Nos. 5 to 16 inclusive.
Booth, Samuel.	No. 4 Queen St., Huddersfield.	Freehold land and buildings, one undivided thirty-fifth part thereof.	
&c., &c.			Cobden's Row, Crossland Moor, Lockwood, Nos. 5 to 16 inclusive,

The case was argued in Michaelmas term last. (a)

Kinglake, Serjt., for the appellant. The question in this case turns upon the construction of the 7 & 8 W. 3, c. 25, s. 7, which enacts "that no person shall be allowed to have any vote in the election of members to serve in parliament, for or by reason of any trust-estate or mortgage, unless such trustee or mortgagee be in actual possession, or receipt of the rents and profits, of the same estate, but that the mortgagor, or *cestui que trust*, in possession, shall and may vote for the same estate, notwithstanding such mortgage or trust; and that all conveyances of any mesuages, land, tenements, or hereditaments in any county, city, or borough, &c., in order to multiply voices, or to split and divide the interest in any houses or lands among several persons, to enable them to vote at elections of members to serve in parliament, are hereby declared to be void and of none effect, and that no more than one single voice shall be admitted for one and the same house or *tenement." The language of the act is clear and explicit. If the object of the vendor and the vendees, in making the conveyance, is, to create a multiplicity of votes in respect of the same property, the case falls within the act: and there is nothing either in the general law of the land, or in any of the subsequent statutes, to destroy or diminish the effect of this provision, or to limit its operation, as will be contended on the part of the respondent, to conveyances that are *fraudulent*, or made subject to a secret understanding that no interest should pass thereby, or that the right of voting should be exercised in any particular way. It may be material to invite the attention of the court to the state of the law upon this subject at the time of the passing of the statute referred to. That will appear from the observations of Lord Somers, by whom the statute of William is known to have been framed, subjoined to his report of the case of *Onslow v Rapley*. (b) That was an action brought by Mr. Onslow against the returning officer of Haslemere for a false return alleged to have been made by him at the election for that place in 1680. The opinion, that the occasional conveyance of burgages was not illegal, was not only denied, but reprehended with great severity and indignation, as an insult to the good policy of the state, and to the government itself. It was there said, "that the making of votes by such means was a very evil and unlawful thing, and tended to the destruction of the government and debauching of parliament;" and "that it was senseless to think such practices were part of the constitution of our government, or to imagine that persons whom we *intrust with our lives and fortunes ought to be made *128] and chosen by such evil devices." (c) Lord Somers observes that the case is made public, amongst other purposes, "to direct places

(a) Before Tindal, C. J., and Coltman, Maule, and Erle, Js.

(b) Lord Somers's Tracts, vol. viii. pp. 270—276. And see S. C., 3 Lev. 29; 2 Ventr. 37; Fortescue, 169; S. C. cited in *Prideaux v. Morris*, 1 Lutw. 89. And see the declaration, and the trial at the Surrey assizes, also reported in 14 Howell, St. Tr. 707, n.

(c) See 1 Peckw. 319.

having a right to elect, to manage the same duly and lawfully, and not only to caution them against making any votes by splitting burgage tenures by such fraudulent conveyances, where the choice is annexed to such tenure; (*all such conveyances as are not real and made bonâ fide upon good consideration, being, in this case, held to be void by the common law;*) but the reason of this case will extend to other ways of election; for, where the choice is by the body corporate, the putting out without just cause such as are incorporate, or the making other members of the corporation to serve a turn at an election, will be equally dangerous, and also ineffectual," &c. Fifteen years after the decision of *Onslow v. Rapley*, the statute of William was passed. The next statute upon this subject is the 10 Ann. c. 23, (a) which, it will be *contended [129 on the other side, is a legislative exposition of the former act.

It does not repeal the statute of William, and it contemplates a totally different object. It applies to all estates and conveyances,—whether they have the effect of multiplying voices or not,—that are made for the purpose of conferring a vote. [TINDAL, C. J. The argument on the other side will be, that these two statutes only apply to *fraudulent* conveyances.] Such conveyances were already avoided by the common law. The language of the statute of William is general. That act avoids the conveyance: the statute 10 Ann. c. 23, declares it to be good. Some reliance may be placed upon the form of oath given in the 10 Ann. c. 23, s. 4, (b) which is a little varied by the 18 G. 2, c. 18, s. 1: but, inasmuch as the statute of William had declared a conveyance, made in order to multiply voices, to be void, the party taking such a conveyance would be equally unable to swear that he had freehold lands, whether the conveyance was *fraudulent* under the statute of Anne or not. The 53 G.

(a) Section 1, after reciting the 7 & 8 W. 3, c. 25, s. 7, "for the more effectual preventing of such undue practices," enacts, "that all estates and conveyances whatsoever made to any person or persons, in any *fraudulent* or *collusive* manner, on purpose to qualify him or them to give his or their vote or votes at such elections of knights of the shire, (subject, nevertheless, to conditions or agreements to defeat or determine such estate, or to re-convey the same,) shall be deemed and taken, against those persons who executed the same, as free and absolute, and be holden and enjoyed by all and every such person or persons to whom such conveyance shall be made as aforesaid, freely and absolutely acquitted, exonerated, and discharged of and from all manner of trusts, conditions, clause of re-entry, powers of revocation, provisos of redemption, or other defeasances whatsoever, between or with the said parties, or any other person or persons in trust for them, or any of them, for the redeeming, revoking, or defeating such estate or estates, or for the restoring or re-conveying thereof, or any part thereof, to any person or persons who made or executed such conveyance, or to any other person in trust for them, or any of them, shall be null and void to all intents and purposes whatsoever; and that every person who shall make and execute such conveyance or conveyances as aforesaid, or, being privy to such purpose, shall devise or prepare the same, and every person who, by colour thereof, shall give any vote at any election of any knight or knights of the shire to serve in parliament, shall, for every such conveyance so made, or vote so created or given, forfeit the sum of 40*l.*," &c.

(b) "You shall swear that you are a freeholder in the county of —, and have freehold lands or hereditaments lying or being at —, in the county of —, of the yearly value of 40*s.* above all charges payable out of the same; and that such freehold estate hath not been made or granted to you *fraudulently*, on purpose to qualify you to give your vote," &c.

See the form of oath prescribed by the 7 & 8 W. 3, c. 25, s. 3.

3, c. 49, is important to show that the statute of William was considered to be then in full operation, independently of the statute of Anne, and also as a clear exposition of the sort of conveyance to which the statute *130] of William was intended *to apply. That act is intituled "An act to explain and amend an act passed in the seventh and eighth years of the reign of the late King William, as far as relates to the splitting and dividing the interest in houses and lands among several persons, to enable them to vote at elections of members to serve in parliament:" and sect. 1, after reciting the 7 & 8 W. 3, c. 25, s. 7, as it is recited in the 10 Ann. c. 23, and further reciting that doubts had been entertained whether devises by will made in such cases, and for such purposes, were within the true intent and meaning of the said act, *enacts and declares* "that all devises by will made in such cases and for such purposes as by the said act are hereinbefore described, are and shall be taken to be *conveyances* within the true intent and meaning of the said act, as if the same had been therein specially mentioned: Provided always, that this act shall not revoke or defeat, or be construed to revoke or defeat, any part of any will in which is comprised any devise or devises which is or are hereby declared void, other than or beyond the devise or devises made void by this act." [MAULE, J. Have you adverted to the circumstance of the statute of William being merely *declaratory*? If a conveyance were colourable, one could understand that it would be void at common law. But, I apprehend, it will scarcely be contended, that, before the passing of that statute, a conveyance for a money consideration would have been fraudulent and void.] It undoubtedly would, if made for the unlawful purpose of creating votes: it would be a parliamentary fraud. In the *East Grinstead Case*, 1 Peckw. 310, it is said: "Occasionality is, perhaps, of all things which concern the law of elections, the most frequent subject of discussion, and the least understood: no definition hitherto given has *131] comprised it in all its *forms. Perhaps a more precise idea may be obtained of it, by considering it in two different points of view, and distinguishing between the two sorts of it. The first kind of occasionality is such as does not contain any of what is generally called legal fraud, but yet is deemed to be a fraud upon the law of parliament: and this is, where the subject to which the right of voting is attached is obtained sincerely and *bonâ fide*, but upon the eve of a particular election, and for the express and only purpose of enabling the person who acquires it to give a vote at that election. Such acquisitions have often been determined by the House of Commons, in its extreme and honourable jealousy of its own purity, to be void as to the particular purpose for which they were made, though to every other they may be substantial and effective. This may be termed occasionality in its most simple form, and in the strictest sense of the word. An instance of it, to cite one out of many, appears in the case of Pontefract, 17 Jan. 1699, 2 Heyw. 344: there it is said 'that Edward Foster's deeds of purchase were produced in court at

the election, but he was refused his vote, because his deeds were dated three or four days after the *teste* of the writ, *though he yet holds the estate!*" So watchful have parliaments been to prevent the fruit of such practices, that no length of time has been permitted to establish that which in its origin was occasional. In the case of Weymouth and Melcombe Regis, 3d June, 1714, the votes of persons who had enjoyed their estates for three years were set aside, because the estates had been at first acquired for the sole purpose of a vote. The second kind of occasionality is so connected with fraud, that they are convertible terms. It consists in an illusory and pretended grant, for the purpose of voting, of that which, in fact, never passes "from one party to the other." [*132] Again, (a) it is said: "The question whether an estate bought solely for the purpose of a vote, could confer a vote, was made and argued in the last Oakhampton case, upon the votes of The Rev. T. Hole, and of Richard Hole, Esq. (b) In the former of these, the fairness of the transaction was admitted; but it was alleged that the vote was bad, 'because the leading intention of the parties was to procure a vote for the grantee.' And of that opinion was the committee, although it was insisted, on the other side, that such an intention was neither illegal nor reprehensible. The principal of these decisions is, that the right of voting, which is accessory and appurtenant to the estate, may not be made the object of contract or purchase *per se*, independently of, or paramount to, the estate itself." The conveyance is not to be made the mere vehicle of a vote. [MAULE, J. Consistently with these authorities, there is no occasionality in the present transaction.] The 53 G. 3, c. 49, clearly shows that the conveyances contemplated by the 7 & 8 W. 3, c. 25, s. 7, were not merely *fraudulent* conveyances.

S. Martin, for the respondent. The objection of occasionality does not apply here. Occasionality is the conferring a vote for a single election, without giving any permanent right. That is what Lord Somers had in view, when he spoke of "serving a turn at an election;" and that is confirmed by the cases cited from Peckwell. It can hardly be said to be an unlawful thing for a man to desire to possess a vote: it would be absurd to contend that it is not a perfectly fair and legitimate object in a man to purchase freehold property for the purpose of acquiring a vote. The statute of William annihilates the conveyance: its *modus operandi* is, to "prevent any estate passing, in cases falling within its provisions: the real object being (and this is confirmed by the 53 [*133] G. 3, c. 49) to prevent an owner of property, of his own head, making conveyances of land, or disposing of it, in joint-tenancy, so as to give to the grantees a right to vote: it never was meant to apply to a case like *this*, where the vendors contract to pay the full value. Reading the statute of William with the statute of Anne, and the 53 G. 3, c. 49, and the oaths therein severally prescribed, the thing prohibited is, a conveyance

(a) 1 Peckw. 365.

(b) 1 Fraser, 174.

for which no consideration is paid, and not a *bonâ fide* purchase for an adequate consideration, notwithstanding the contracting parties may have intended the one to obtain, and the other to confer a vote. [MAULE, J. If a man choose to *give* land, it would not be a fraud upon the act.] Suppose a landed proprietor, upon his son's coming of age, conveys an estate to him, and tells him it will give him a right to vote; would the talk about the vote invalidate the conveyance? In Elliott on Registration, p. 90, it is said: "It has been argued, that the practice of making even *bonâ fide* conveyances, and for a valuable consideration, for the purpose of multiplying votes, is illegal, and was so at the common law. But the better opinion appears to be, as stated in Heywood's County Elections, 2d edit. p. 154, that the practice was not prohibited, provided the transactions by which they were created were sincere and *bonâ fide*, that one might sell and another buy so much land as would qualify the purchaser to vote, without being guilty of any thing either immoral or illegal, and that votes were bad for occasionality only where there was *fraud* in the transaction, and the transfer of the property was only pretended, and not real, or accompanied with some secret trust as to the vote which was *134] the object of it. *The statute 7 & 8 W. 3, c. 25, so far as it relates to the splitting of freeholds, does not appear to have been ever acted upon by committees in the case of county electors." And the Okehampton case is referred to. The statute 10 Ann. c. 23, s. 1, may be considered as a legislative interpretation of the 7 & 8 W. 3, c. 25, s. 7. It was so contended in *Marshall*, app., *Bown*, resp., 7 M. & G. 188, 8 Scott, N. R. 889; and this argument seems to have been adopted by the court. The only distinction between that case and the present is, that there the vendor was not privy to the alleged illegal purpose of the purchasers; and here, he is: but such privy alone will not bring the case within the statute. If the argument urged on the part of the appellant, as to the construction of the statute of William, be correct, there was no necessity for the subsequent statute.

Kinglake, Serjt., in reply. The present question is left untouched by the decision in *Marshall*, app., *Bown*, resp. If the argument just urged be well founded, there is, at the present day, no law to prevent the splitting of tenements. [MAULE, J. Provided it is *bonâ fide* and honestly done.] The case supposed of a conveyance or gift from a father to a son, would clearly be within the statute, if the sole object were the conferring a vote. (a) *Cur. adv. vult.*

TINDAL, C. J., now delivered the opinion of the court.

This appeal against the decision of the revising barrister for the west riding of the county of York raises the distinct question, whether a conveyance of *135] land to a numerous body of purchasers, as tenants in common, is *void under the seventh section of the statute 7 & 8 W. 3, c. 25; such conveyance being made, both on the part of the vendor and of the ven-

dees, "for the avowed and only object of multiplying voices in the election of members to serve in parliament," but, at the same time, being a *bonâ fide* conveyance made upon a contract of sale, where the purchase-money was really paid, and possession of the land really taken and kept, under the conveyance, and where there was no secret trust or reservation in favour of the sellers, nor any stipulation as to the mode in which the elective franchise should be exercised.

The question is, undoubtedly, one of considerable importance, not only as it involves a general principle of election law, but as it applies to a large number of the cases reserved for our determination. It has been argued before us both upon the present and upon another of the reserved cases; and we are of opinion, upon the proper construction of the statute above referred to, taking into consideration at the same time the statutes subsequently passed upon the same subject-matter, that the conveyance in question was not a void conveyance, and that the several persons claiming a right to vote under it were entitled to have their names retained on the list of voters for the west riding of the county of York.

Even if the statute 7 & 8 W. 3 were the only statute passed upon the subject, and that statute were to be construed strictly by its very letter, we think its provisions could not be held to extend to the case of any conveyance made upon a real and *bonâ fide* contract for a sale and purchase of the land; but that the statute was intended to apply to fictitious conveyances which had nothing more than the form and appearance of a conveyance, which consisted of the parchment and the seal only, the parties thereto having privately agreed *and intended that no interest should actually pass thereby. [*136

The first observation that arises upon the statute of Will. 3 is, that the section now under discussion is *declaratory* only of the common law. The first branch of that section does, indeed, create a new law. It is thereby *enacted*, that no person shall have a vote at elections by reason of any trust-estate or mortgage, unless such trustee or mortgagee be in actual possession or receipt of the rents or profits of the same estate; but that the mortgagor, or *cestui que trust*, in possession, shall vote for the same estate. But the second branch of the section, which is that now under consideration, is framed very differently. By this latter branch, all conveyances in order to multiply voices and to split and divide the interest in any houses or lands among several persons, to enable them to vote, are thereby *declared* to be void and of none effect.

This marked distinction between the two parts of this section proves, incontestably, that the latter part was intended only to *declare* the law as it then stood, giving to such law the greater weight and sanction of a legislative declaration.

The first question, therefore, is, what conveyances made in order to multiply voices at elections would be void at common law.

The right of voting for knights of the shire did, by the common law, as regulated by the two statutes 8 H. 6, c. 7,(a) and 10 H. 6, c. 2,(b) belong to such people resident in each shire,(c) whereof every one had a frank-tenement within the same county to the value of 40s. by the year, at *137] *least, above all charges. And there was no restriction or prohibition, by the common law, against any man's purchasing freehold within the county, of sufficient amount to qualify him to vote, nor, on the other hand, against any man's selling the same to one or to any number of purchasers, although the object of the seller and purchaser might be that the purchaser should acquire a vote, and, consequently, that the number of voters should be thereby increased. By the common law, therefore, no conveyance really and honestly made for the purpose of carrying such contract into effect, was void. But, by the common law, from the earliest times, a conveyance, however perfect in point of form, being such in form only, and intended by the secret agreement or understanding between the parties, never to have any real effect as a conveyance, was always held to be void, whatever the secret object and purposes of the parties in making such conveyance might be. The old text-writers lay it down as a maxim, that "the law abhors covin, and therefore every covinous act shall be void." And it is, upon that principle, unquestionable, that a conveyance made in order or for the purpose of giving a qualification to vote at an election, or for any other purpose, if made with the secret intention and design that it should appear to the world as a conveyance, but, as between the parties themselves, should pass no interest, and have no effect, would be fraudulent and void at common law. Lord Somers—and it is impossible to name an authority of greater weight on a subject of this nature—is express to this point. In the observations made by him on the trial of the case of *Onslow v. The Bailiff of the Borough of Haslemere*,(d) for misconduct as a returning officer, on which *138] occasion it was proved that many of the voters claimed *under conveyances of very minute and insignificant parts of burgage lands, which had been lately made, and which were fraudulently contrived to make votes against an election, he lays it down thus:—This case should caution places having rights to elect, against making votes by splitting burgage tenures by such fraudulent conveyances; "all such conveyances as are not real, and made *bonâ fide* upon good consideration, being in the case held to be void by the common law." He thus draws a very marked distinction between conveyances made to give qualifications where they are real and honest, and where they are fraudulent and fictitious; considering the latter only to be void at common law. And,

(a) See this statute in full, as it stands on the parliament roll, 4 Rot. Parl. 350 a. See also 7 M. & G. 48, 141, n., 213.

(b) See 4 Rot. Parl. 402 b.

(c) This provision has since been repealed by the 14 G. 3, c. 58, to the great increase of the expense of county elections.

(d) Lord Somers's Tracts, vol. viii. p. 275.

as this trial took place only about fifteen years before the passing of the statute of W. 3, the language of Lord Somers affords strong evidence how the common law stood at the time of the passing of that act.

Again, the very language of the statute of William seems to point to the necessary distinction, that real and *bonâ fide* conveyances were not intended to be avoided, although the motive or purpose of the parties might be that of multiplying voices at elections, but such conveyances only made for that purpose as were pretended and fictitious. The statute says: "All conveyances in order to multiply voices" are declared to be void. The statute names the conveyance only: it makes no reference whatever to any contract for sale upon which a real conveyance was grounded, nor professes to deal in any manner with the estate or interest in the land which was affected by such contract of sale, nor provides for the revesting of the land which passed into the possession of the purchaser under the contract of sale, nor for the repayment of the purchase-money to the purchaser—all of which provisions might reasonably be expected, if a conveyance upon a real **bonâ fide* contract of sale, and not a fictitious conveyance only, was intended to be avoided [*139 on account of the motive upon which it was entered into. And this is the more striking, as, in the very same section, provision is made as to the estate of trustees and mortgagees; so that the mind of the legislature must have been awake to the difference between a pretended conveyance, which conveyed no estate, and one which was the completion of a real contract between seller and purchaser—according to the distinction laid down by Lord Thurlow,(a) "that, if the *jus disponendi* remains in any other person, it is in vain that the parchment conveys the right to the grantee; for, the real use of the estate remains in another." And, if the words of the statute do not in their strict and necessary construction compel us to hold a conveyance made for the completion of a *bonâ fide* contract of sale to be void, upon the ground that the object and purpose was to multiply voices at an election, there is no general principle upon which those words ought to be extended. The object of increasing the number of freeholders at a county election is not an object, in itself, against law or morality, or sound policy. There is nothing injurious to the community in one man selling and another buying land for the direct purpose of giving or acquiring such qualification. The object to be effected is neither *malum in se* nor *malum prohibitum*. On the contrary, the increasing the number of persons enjoying the elective franchise has been held by many to be beneficial to the constitution, and certainly appears to have been the leading object of the legislature in passing the late act for amending the representation of the people of England and Wales. What ground, therefore, can exist for extending to a real and honest proceeding the words of a statute which may be fully

(a) 2 Lud. on Elections, p. 371.

*140] *satisfied by giving them the force of avoiding a fictitious conveyance only?

It is further to be observed, that the holding the statute of William to extend to a conveyance made upon a real sale, would be productive of much inconvenience and injury to all claiming under the purchaser. The supposed object and purpose which the sale was intended to effect, cannot be discovered upon the face of the conveyance, but is altogether concealed in the breasts of the parties themselves; so that, by means of the larger construction of the statute contended for on the part of the appellant, at any future time, and between other parties than those to the original conveyance, this secret motive for making the conveyance, if brought to light by accident or otherwise, might destroy the title to the estate, in whosoever hands it might be. The same rule of law must apply, whether the purchasers are many or few; perhaps, even, a conveyance of part of the seller's land to one single person, with the object above mentioned, must be held to be void: so that, upon such construction of the act, a man of large landed estate could not sell any part of it *bonâ fide*, for a full consideration in money, to two different purchasers, or, perhaps, to one only, if the object of such sale was to give the purchaser a vote for the county; for, the creation of two additional votes, or, perhaps, of one only, would be equally within the principle, though not in equal degree a multiplication of voices at an election, and a splitting and dividing the interest in houses or lands among several persons. The holding, therefore, the literal construction of the words of the statute of William to make such *bonâ fide* conveyances absolutely void, would very much fetter the full and free enjoyment of landed property, and create insecurity in titles to estates.

*141] Upon these various grounds, and for these considerations, *we think the sounder construction of the statute of William, taken by itself, is, that, by the conveyances made in order to multiply voices which are thereby declared to be void, are intended such conveyances only as at the time of passing the act would have been held to be void by the common law, that is, conveyances meant by the parties not to transfer any real interest in the land, but made for the purpose of multiplying voices at elections, and for that purpose only. And, as to the observation made in the course of the argument, that, if already void by the common law, there was no necessity for avoiding them by the statute,—it may be a sufficient answer that it was thought useful, when such baneful practices as those described by Lord Somers, in the passage before cited, were in daily practice, to promulgate this doctrine of the common law to sheriffs and other officers upon whom the duty of conducting the election was cast, and to give it the additional weight and solemnity of a legislative declaration.

If, however, any doubt existed upon the construction of the statute of W. 3, when considered by itself, such doubt would be removed when the

subsequent statutes made upon the same subject, and to effectuate more fully the same object, are taken into consideration.

The next statute in order of time is that of the 10 Ann. c. 23. That statute, it is to be observed, is not so wide in its operation as the statute of William; for, whilst the earlier statute, by its general terms, extends to all elections where the right of voting depended on the ownership of land, whether in counties or boroughs, the statute of Anne is confined exclusively to the multiplying of votes upon the election of knights of the shire. This statute is intituled "An act for the more effectual preventing fraudulent conveyances in order to multiply votes for electing knights of the shire to serve in parliament;" the very title of the act *leading to the inference that it is directed, not against *all conveyances* [*142 for that purpose, but against *fraudulent conveyances* only. The act then begins by reciting in terms the seventh section of the 7 & 8 W. 3, upon which this question arises; and it then further recites that many fraudulent practices have been used of late "to create and multiply votes, to the great injury (amongst others) of those persons who have just right to elect." The recital, therefore, as well as the title, equally point out the distinction between the creation of votes by fraudulent and fictitious means, and the making of real votes; the latter of which could never be considered to fall within the language of the recital, to be an injury to those persons who have just rights to elect. And the first section then goes on to enact that all estates and conveyances whatsoever made to any persons in any fraudulent and collusive manner, on purpose to qualify them to give their votes at such elections, subject, nevertheless, to conditions or agreements to defeat or determine such estate, or to re-convey the same, shall be deemed and taken, against the persons who executed the same, as free and absolute, and be holden and enjoyed by all such persons to whom such conveyance shall be made as aforesaid, freely and absolutely exonerated and discharged from all manner of trusts, conditions, clauses of re-entry, &c., or other defeasances whatsoever: and the act then goes on to enact that all securities given for the performance of such trusts, &c., shall be void; and imposes a penalty of 40*l.* upon every person executing such conveyances, or voting under them.

And we consider this latter statute to be a legislative exposition of the clause of the statute of W. 3, therein set forth; that the avoiding of conveyances made in order to multiply voices at elections was meant by the original statute to be confined to such conveyances only *as were fraudulent and collusive—to conveyances which are such in form [*143 only, but never intended to pass the property; or such as were accompanied with some secret trust or reservation for the benefit of the grantors; and not to extend to a *bonâ fide* conveyance made in completion of an actual contract of sale and purchase of land: for, the statute of Anne is expressly limited to fraudulent conveyances; and it cannot be intended that the statute of Anne, passed to render the former statute of William

more efficacious, should be, as to county elections, less comprehensive in its provisions than the former statute; or that the former should comprise within it the avoidance of a *bonâ fide* conveyance, when the latter is restricted to fraudulent conveyances only.

The statute of Anne, it is to be observed, meets the evil intended to be put down, by a very different provision from that contained in the statute of William: for, whereas the statute of William is contented with simply declaring the fraudulent conveyance void, thus leaving the grantor and the grantee as if the conveyance had never been made, the statute of Anne, on the contrary, provides that the fraudulent conveyance made for the purpose of giving a qualification, "shall be deemed and taken, against those persons who executed the same, as free and absolute, discharged from any manner of trust or condition for the benefit of the grantor," and at the same time prohibits the grantee from voting under colour of the grant, by making him liable to a penalty of 40*l.* to the common informer—the legislature, probably, thinking that the practice of granting fraudulent and collusive freeholds would be more effectually checked by making such conveyances good against the grantor, and by frustrating the object of the grantee. But this provision never could in reason or sense be meant to apply to a conveyance upon a real sale of the land, where the seller has already received the *purchase-money, and has always
 *144] intended the grant to be good against himself; and, further, the oath directed by the statute of Anne appears quite conclusive as to the distinction between fraudulent and real conveyances made for the purpose of creating a vote, viz.: "You shall swear that such freehold estate hath not been made or granted to you *fraudulently*, on purpose to qualify you to give your vote."

The next statute which touches this question is, the 18 G. 2, c. 18, s. 5, and the enactment contained therein confirms the distinction to which we have often recurred. That statute enacts "that no person shall vote in respect or in right of any freehold estate which was made or granted to him *fraudulently*, on purpose to qualify him to give his vote;" thereby, as in the statute of Anne, prohibiting the voting, not in every case where the estate is conveyed to him for the object of enabling him to vote, but in such case only where it is fraudulently made to him for that purpose; that is, where the grantee of the estate, although he appears on the face of the conveyance to take under it, does in reality, as between the parties themselves, take nothing, or where it is accompanied with a secret trust for the benefit of the grantor.

In the course of one of the arguments before us, some stress was laid by the counsel contending for the illegality of the vote, upon the statute 53 G. 3, c. 49. That statute was passed to explain and amend the statute of W. 3; and, after reciting that doubts had been entertained whether devises by will made in such cases and for such purposes as those mentioned in the former statute, were within the true intent and meaning of

that act, it enacts that all devises by will made in such cases and for such purposes as by the act of William are described, are, and shall be taken to be, conveyances within the true intent and meaning of the *act, as if the same had been therein specially mentioned. And the [*145 argument was, that it was singular the 53 G. 3, c. 49, should refer to the statute of William, not to the statute of Anne, unless the statute of William was in full operation, independently of the statute of Anne. But to this it may be answered, that the reference may well have been made to the statute of William, because the intention of the legislature was, that the devise which gave a fraudulent qualification should be altogether void ; whereas, if reference had been made to the statute of Anne, the devise would have been good against the heirs of the devisor. The whole object of the statute is, in fact, to write the word “ devise ” into the statute of William ; leaving devises to be dealt with in the same manner and by the same rule of law as applied to conveyances. If the devise was fraudulent—if it was never intended to pass the land, by means of a secret compact with the devisor in his lifetime that the devisee would not take, or that he would re-convey—then the statute of 53 G. 3 would bring the devise exactly into the same predicament as a fraudulent conveyance under the statute of William. But, on the other hand, if the will even openly expressed that a father devised to his son an estate of 40s. a year, intending thereby to qualify him to vote for the county, yet, if the son entered into possession and held the land without any secret understanding or reservation on his part, the devise would then be in the same predicament as a conveyance for the same purpose, and would be good.

Therefore, upon the whole state of the case, considering the statute of William by itself, and with reference also to the later acts, we think a conveyance made in completion of a *bonâ fide* contract of sale, where the money passes from the buyer to the seller, and the possession also from the seller to the buyer, and where there is no secret reservation or trust whatever for the *benefit of the seller, is not avoided by reason of [*146 the object or motive of the purchaser and seller being that of multiplying voices at an election : and, as the revising barrister has by his finding brought the present case within that description, we think his decision, by which he retained the names of these purchasers on the list of voters, was right, and ought to be affirmed.

Decision affirmed.

LANCASHIRE, SOUTHERN DIVISION.

JOHN RILEY, Appellant, JOHN CROSSLEY, Respondent. Jan. 29.

A conveyance made to carry into effect a real *bonâ fide* contract of sale, where the purchase-money is paid, and the possession taken, without any secret reservation or trust whatever for the benefit of the seller, is not within the 7 & 8 W. 3, c. 25, s. 7, notwithstanding it is made with a view to the multiplying of voices or the splitting of freeholds; the intention of the statute being, to avoid such conveyances only, made with that view, as are in themselves fraudulent and collusive.

JOHN CROSSLEY, of Scaitcliffe, in the parish of Rochdale, in the southern division of the county of Lancaster, objected to the names of Amos Blackburn, and twenty-five other persons whose names and descriptions were set forth in a schedule at the end of the case, being retained on the list of persons entitled to vote for members of parliament for the said division, in respect of their several undivided shares of certain freehold land and houses situate at Butcher Hill, in the township of Todmorden and Walsden in the said division. The barrister struck out all the names from such list, subject to the opinion of the court of Common Pleas on the following case:—

By indenture, dated the 22d of January, 1845, and made between one John Webster of the first part, James Dawson and Sarah his wife of the second part, and John Riley and John Crossley, (two of the claimants in *147] the list *above referred to,) of the third part, in consideration of 916*l.* 14*s.* (700*l.* of which was stated to be paid by Riley and Crossley to Webster in satisfaction of a mortgage for a term of years which he held on the hereditaments hereinafter mentioned, and the remaining 216*l.* 14*s.* of which was stated to be paid by Riley and Crossley to Dawson, the reversioner in fee,) fourteen cottages situate at Butcher Hill aforesaid, with their appurtenances, were surrendered, released, and conveyed unto and to the use of Riley and Crossley, and their heirs for ever. This deed contained the usual covenants, and was duly executed.

By indenture of the same date with the last deed, but subsequently executed, and made between Riley and Crossley of the first part, and the several persons whose names were respectively contained in the schedule at the foot of the deed, (and being the said Riley and Crossley, and Amos Blackburn and all the other claimants named at the foot of the case,) of the second part—after reciting the former indenture, and that the purchase-money of 916*l.* 14*s.* mentioned in that deed was the proper moneys of, and equally contributed amongst, Riley and Crossley, and several other parties thereto of the second part—Riley and Crossley declared and covenanted with the other parties of the second part, that they would stand seised of, and interested in, the cottages and hereditaments com-

prised in the first deed, in trust for themselves and such other parties of the second part respectively, as tenants in common in fee. This deed contained a power for Riley and Crossley, and the survivors, or other trustee for the time being, at any time during the lives of any of the parties of the second part, and within twenty-one years from the death of the survivor, with the written consent of the major part in value of the persons for the time being equitably interested under the trust therein declared, and against *the will of the minority, to lease the said [*148 hereditaments for any term of years, or to sell or exchange or make partition of the same, and to repurchase any other freehold hereditaments within the united kingdom, to be held under the like trusts, &c. This deed, also, contained the usual trustees' receipt and indemnity clauses.

It appeared in evidence, that a Mr. John Veevers, in the beginning of January, 1845, applied to Dawson to purchase the cottages in question, which the latter had been offering for sale for some time previously, he being desirous of paying off Webster's mortgage. No contract in writing was entered into between Dawson and Veevers; the object of the latter, in making the application, being, to purchase, not for himself, but for a number of other parties, to procure them qualifications to vote for members of parliament for South Lancashire, Veevers being a member of a certain political association, and actively engaged in procuring qualifications to vote for such persons as were believed to favour the objects of such association.

The first deed was executed by Dawson on the day it bears date, when the whole of the purchase-money was paid by Riley, who had previously received the respective shares thereof from the other parties of the second part of the deed.

It appeared that Dawson had never seen either Riley or Crossley in reference to the purchase, before the day when he executed the conveyance; nor did he even then know who were the other parties on whose behalf the purchase was made.

All the claimants have been in the receipt of their respective shares of the rents of the cottages, which are of sufficient qualifying value to each.

The barrister was of opinion, that the object of Riley and Crossley, and of all the other claimants who are parties to the second deed, in purchasing the above *cottages, was, to procure for each of them- [*149 selves a qualification to vote for South Lancashire; he also thought that Dawson, before he executed the conveyance to Riley and Crossley, knew that the object of Veevers in contracting to purchase, and of Riley and Crossley in obtaining such conveyance, was, to procure such votes. But he believed that the sale on Dawson's part was *bonâ fide*, his object in selling, being, not for the purpose of conferring such votes on the purchasers, but to dispose of his property to the best advantage.

Pearce and Bagnall, they having a mortgage in fee upon them for securing the repayment by Duffield of 370*l.* and interest; and Duffield was entitled to the equity of redemption of the said premises, subject to the said mortgage. Prior to the 31st of January last, Duffield, without any privity or concurrence on the part of Pearce and Bagnall, contracted with the said fifteen claimants, and with four other persons, (whose title to be placed on the register did not come in question,) for the sale to them of the said premises, for 574*l.* The solicitor of the purchasers, who was also Duffield's solicitor, was instructed by the purchasers and by Duffield, to prepare the conveyance, and accordingly applied to the solicitors of *153] the mortgagees for an abstract of title, which was furnished by them according to the usual professional practice.

The deed of conveyance having been prepared by the solicitor of the purchasers and of Duffield, and having been perused and approved of by the solicitor of the mortgagees, was duly executed by Pearce and Bagnall and by Duffield on or before the 30th of January last; and on or before that day the said fifteen claimants and the said other four persons were let into possession of the premises under it. In the deed of conveyance the consideration was stated to be, and in fact was, 370*l.* paid to Pearce and Bagnall in satisfaction of their mortgage, and 204*l.* paid to Duffield, making the total purchase-money 574*l.*: and, in consideration of those respective sums, the whole estate, legal and equitable, in the premises, was conveyed to the persons after-mentioned^(a) by Pearce and Bagnall, and by Duffield.

The purchase-money was contributed, in equal shares, by the whole body of purchasers, each one *bonâ fide* paying his share; and the conveyance was made, by the deed above-mentioned, to two of the purchasers, (James Edwards and John Watson,) in fee, as trustees for the whole body; and another deed was simultaneously executed by Edwards and Watson of the one part, and the remaining purchasers of the other part, by which it was declared that Edwards and Watson, and their heirs, should stand seised of the premises in trust for themselves and the other subscribers, as tenants in common in fee.

The principal object of each of the said purchasers, in making the purchase, was, to multiply voices, and to split and divide the interest in the premises among the said several purchasers, to enable them to vote at elections of members to serve in parliament for the said southern division *154] of Lancashire: and it was well known by each of them that they all belonged to the same political party; and they felt no doubt that the votes to be acquired by the said purchase would be given in support of the same political interest, though there was no express agreement to that effect.

Duffield, the owner of the equity of redemption, at the time when he

(a) The persons named in the schedules before referred to.

entered into the contract of sale, and when he executed the deed of conveyance, was aware that each of the claimants had the above object in view in making the purchase, and that they believed the votes to be acquired by it would be given in support of the same political interest; but he was not led to sell the premises to them by any wish on his own part to promote such object, or to further the views of any political party; and he would as readily have sold the premises to any other purchaser at the same price.

Pearce and Bagnall, the mortgagees and owners of the legal estate, were not, nor were either of them, nor were their solicitors,^(a) in any degree aware of the above-mentioned object of the purchasers—they not even knowing that the conveyance to Edwards and Watson was made to them in trust for other purchasers besides themselves, nor did they take any part whatever in negotiating the sale, or in completing it, except as above stated: Duffield and his solicitor being the sole active parties in effecting such sale.

The premises were fairly worth the sum of 574*l.* given for them; and the purchasers considered they were laying out their money on a reasonably good investment. There was no secret trust or reservation in favor of the sellers, or of any of them; nor was there any thing collusive or fraudulent in the transaction.

The annual value of the share of each claimant in the *premises was above 40*s.*: and the only objection to the right of each claimant to be placed on the register, was, that the facts above stated in respect of the sale and conveyance by Duffield, and by Pearce and Bagnall, brought this case within the scope and operation of the 7 & 8 W. 3, c. 75, s. 7; and it was contended that the claimants were consequently not entitled to have their names placed on the register of voters. [*155]

The revising barrister overruled the objection in the case of each of the said claimants, and allowed the name of each to remain on the list.

Robert Bamford and fifteen other persons also named and described in the schedule annexed to the case, in like manner claimed to be inserted in the same list, in respect of property in the same township acquired under precisely the same circumstances as above. They were also objected to; and their names were retained subject to appeal. The cases are consolidated.

The question for the opinion of the court is, whether or not the revising barrister was right in the decision above stated. If he was wrong, the names of all the persons mentioned in the two schedules are to be expunged from the register of voters. If he was right, the register is to remain unaltered.

The case came on for argument in Michaelmas term last.^(b)

Cockburn (with whom was *Kinglake*, Serjt.) appeared for the appellant,

(a) See *Hoyland*, app., *Bremner*, resp., ante, p. 84.

(b) Before Tindal, C. J., and Coltman, Maule, and Erle, Js.

and *Byles*, Serjt., for the respondent. It was admitted that there was no substantial distinction between this case and that of *Alexander*, app., *Newman*, resp., antè, p. 122. *Cur. adv. vult.*

*156] *TINDAL, C. J., now said—This case also stood over to await the determination of the case of *Alexander*, app., *Newman*, resp., the circumstances of which are admitted not to be distinguishable in any main point. It will, therefore, be unnecessary to say more than that we think the case has been properly decided by the revising barrister, and that the names of the respondent and the fourteen other claimants therein mentioned, should remain on the list; and we affirm the decision accordingly. Decision affirmed.

COUNTY OF LANCASTER, SOUTHERN DIVISION.

RICHARD BESWICK, Appellant, HENRY AKED, Respondent. Jan. 29.

See the marginal note to *Alexander*, app., *Newman*, resp., antè, p. 122.

HENRY AKED, James Aked, and forty other persons mentioned in a schedule annexed to the case, claimed to be entitled to vote for the southern division of the county of Lancaster, in respect of the same freehold premises, which consisted of several small houses situate in the township of Manchester.

It appeared, that in January, 1845, Ackroyd, Crossley, and Morris, (who were not among the above claimants,) contracted with one Hardman to purchase of him the premises in question, for 1370*l*. The money was paid by Ackroyd, Crossley, and Morris, to Hardman; and Hardman conveyed the premises to them in fee.

The principal object which Ackroyd, Crossley, and Morris had in view, when they purchased the premises, was, to multiply voices, and to split and divide the interest in the above premises among several other persons, *to enable them to vote at elections of members to serve
*157] in parliament. But Hardman knew nothing of the object which the purchasers had in view, and had no such object in view, on his part, and was not aware that any other persons were interested in the purchase, but the three persons above mentioned; and the conveyance of the premises was *bonâ fide* made by him as aforesaid.

By a subsequent deed, executed also in January last, and to which Ackroyd, Crossley, and Morris, and also all the above claimants were parties, Ackroyd, Crossley, and Morris declared that the 1370*l*., so paid by them to Hardman, were the proper moneys of, and equally contributed by and amongst, themselves and the above claimants severally, and that the premises had been conveyed to them as aforesaid, to the intent that the same should be held by them in trust for themselves, and for all and each of the above claimants respectively, and their respective

heirs and assigns, as tenants in common, and not as joint-tenants. There were provisions in the subsequent deed, to enable the trustees, with the consent of the major part of the persons from time to time interested in the premises, to lease the premises for any term of years, or upon any other terms which should be deemed expedient, or to sell the premises, or any part thereof, together, or in parcels, or to exchange the premises for other freehold premises; which latter were to be settled upon the same trusts as those above purchased.

The 1370*l.* were the proper moneys of, and equally contributed by and amongst, the said Ackroyd, Crossley, and Morris, and the above claimants respectively.

The principal object which Ackroyd, Crossley, and Morris, and also which each of the above claimants had in view at the time when they so contributed and paid the purchase-money as above mentioned, and at the *time of the execution both of the first and of the second deed, was, [158 to multiply voices, and to split and divide the interest in the above premises among the several parties above mentioned, in order to enable them to vote at elections of members to serve in parliament; and, at the time when the purchase-money was so contributed and paid as aforesaid, and at the respective times when both the said deeds were severally executed as aforesaid, there was a *belief* (though there was no *express agreement*) by and between Ackroyd, Crossley, and Morris, and all and each of the above claimants, that Ackroyd, Crossley, and Morris, and also all and each of the above claimants, would vote, in respect of the said premises, in the election of members to serve in parliament, in the same way, and in support of the same interest.

Since the execution of the second deed, all the parties to it have been in possession of the said premises, and in receipt of the profits thereof respectively. The value of the property was sufficient to confer a vote on each of the claimants; and the only objection was, that, as far as the first deed was concerned, none of the claimants took any estate or interest, at law or in equity, under it, so as to entitle them to be retained on the list of voters for the said division; for, that, whatever might be the general rule, no equitable estate or interest would, under the above circumstances, result to the claimants under the first-mentioned deed, so as to confer a right on the claimants to vote as aforesaid; and that, as far as the second deed was concerned, inasmuch as all the parties to it had, at the time when they executed it, the object in view as above mentioned, such deed was, under the provisions of the 7 & 8 W. 3, c. 25, at least as far as the right of the above claimants to vote as aforesaid was concerned, void and of none effect.

*The revising barrister overruled the objections, and allowed the vote of each claimant respectively, subject to the opinion of this court. [159

The cases of one hundred and thirty-three other persons—whose names

were respectively mentioned in schedules annexed to the case, and whose claims were allowed under similar circumstances to the above, and subject to the same objections—were consolidated with the principal case.

If the court of Common Pleas shall be of opinion that the objection was valid, then the votes of each of the above claimants are to be disallowed, and their names are to be expunged from the said list; otherwise, the decision of the revising barrister is to be confirmed.

The case came on for argument in Michaelmas term last. (a)

Cockburn, (with whom was *Kinglake*, Serjt.,) for the appellant, relied on *Marshall*, app., *Bown*, resp., 7 M. & G. 188, 8 Scott, N. R. 889, as being exactly applicable; he also referred to *Baxter*, app., *Newman*, resp., 7 M. & G. 198, 8 Scott, N. R. 1019.

Byles, Serjt., appeared for the respondent.

Cur. adv. vult.

TINDAL, C. J., now said—This case also stood over to await the determination of that of *Alexander*, app., *Newman*, resp., ante, p. 122, from which it is not distinguishable in any material point. We think, therefore, for the same reasons, that the decision of the revising barrister, by which the name of the respondent, and those of thirty-one other claimants are retained on the list, is a right decision; and we affirm the same.

Decision affirmed.

(a) Before Tindal, C. J., and Maule, Coltman, and Erle, Ja.

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*COUNTY OF CHESTER, NORTHERN DIVISION.

JOHN THORNILEY, Appellant, The Rev. ROBERT BROOK ASPLAND, Respondent. Jan. 29.

A conveyance made for a *bonâ fide* consideration, in trust, as to one-tenth for the grantor himself, and, as to the other nine-tenths, for certain other parties who amongst themselves contributed nine-tenths of the purchase-money, is not within the 7 & 8 W. 3, c. 25, s. 7, notwithstanding the avowed object of the grantor is to multiply, and of the other parties to acquire, the right of voting.

JOHN THORNILEY duly objected to the names of John Hibbert, Robert Brook Aspland, and seven other persons being retained on the list of voters for the township of Newton, in the northern division of the county of Chester, in respect of certain freehold premises at Newton Green.

Upon the parties appearing to support their claim to have their names retained in the said list, a deed of appointment and release was produced, dated the 1st of January, 1842, made between the Rev. R. B. Aspland (one of the claimants) of the first part, John Hibbert (another of the claimants) of the second part, and the said other claimants above mentioned, and another party, of the third part, whereby—after reciting that the said R. B. Aspland was seised of certain freehold premises, (being the

same in respect of which the parties thereto of the first, second, and third parts respectively claimed to be upon the said list of voters;) and reciting that the parties of the second and third parts had contracted with Aspland for the purchase from him of nine-tenth parts of the premises, at the sum of 180*l.*, and that he had agreed to convey the whole of the premises to Hibbert and his heirs, in trust for all the parties thereto, as well of the first as of the second and third parts, subject to a certain mortgage thereon—it was witnessed, that, in consideration of the said sum of 180*l.* to Aspland paid, in equal shares and proportions, by the parties thereto of the second and third parts, he, *Aspland, did thereby [161 direct and appoint, and also grant, bargain, and release unto Hibbert all the said hereditaments and premises, to have and to hold the same unto Hibbert and his heirs to the uses following, that is to say, as to one-tenth part of and in the said premises thereby appointed and released, the whole into ten equal parts or shares being considered as divided, to the use of Hibbert and his heirs, and, as to the said nine parts or shares respectively, to the use of the parties thereto of the first and third parts respectively, and their respective heirs and assigns, as tenants in common.

The hereditaments so conveyed were of the annual value of 22*l.*, after satisfying the interest on the mortgage.

The payment of the money stated in the deed as the consideration for the conveyance, was proved to have been made at the time of the date and execution thereof, and was an adequate consideration for the nine-tenth parts of the said hereditaments and premises so conveyed by Aspland as aforesaid.

It was objected, that, from the facts which were apparent on the face of the deed, the transaction came within the 7 & 8 W. 3, c. 25, s. 7, the object being evidently for the multiplying of votes—an object to which the vendor himself *must* have been privy.

The revising barrister decided, upon the whole case, that the names of the said claimants should be retained on the said list: and, upon the point of law, he decided that the conveyance was not void, under the provisions of the statute.

If the court shall be of opinion that the said decisions were wrong, then the said names are to be expunged from the list. If otherwise, the appeal is to be dismissed.

*The case came on for argument on a former day in this [162 term.(a)

Welsby, for the appellant, submitted that it was obvious, on the face of the transaction, that the purpose of the vendor was to make votes, and therefore that the case was within the 7 & 8 W. 3, c. 25, s. 7.

Cockburn, for the appellant. The revising barrister has declined to infer any such intention: it must therefore be assumed that the fact is the

(a) Jan. 15. Before Tindal, C. J., and Maule, Cresswell, and Erle, Ja.

other way ; and consequently the case falls within *Marshall*, app., *Bown*, resp., 7 M. & G. 188, 8 Scott, N. R. 889. *Cur. adv. vult.*

TINDAL, C. J., now said : This case also stood over to await the determination of that of *Alexander*, app., *Newman*, resp., antè, p. 122, from which it is not materially distinguishable. We think the decision of the revising barrister, that the names of the nine claimants should be retained on the list of voters, was right ; and we affirm the same.

Decision affirmed.

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*COUNTY OF CHESTER, NORTHERN DIVISION.

JAMES NEWTON, Appellant ; ROBERT HARGREAVES, Respondent. *Jan. 29.*

A deed of gift *bonâ fide* executed by a father to his sons, expressed to be in consideration of natural love and affection, is not within the 7 & 8 W. 3, c. 25, s. 7, although the avowed object of the father was to confer votes upon his sons.

JAMES NEWTON duly objected to the names of Robert Hargreaves and Samuel Hargreaves being retained on the list of voters for the township of Mobberley, in the northern division of the county of Chester, in respect of certain freehold land called Holt's Farm. The facts were as follow:—

Robert Halstead Hargreaves, the father of the two claimants, being seised in fee of a messuage and farm at Mobberley, in the northern division of the county of Chester, and also of certain hereditaments in the southern division of the county of Lancaster, in December, 1844, proposed to the two claimants to execute a deed of gift in their favour of sufficient property in both those counties to entitle them to be registered as voters ; and accordingly a deed was executed on the 30th of January, 1845, by which the said R. H. Hargreaves, in consideration of natural love and affection, conveyed to the two claimants, and their assigns, for the life of the grantor, two closes of land, part of Holt's Farm, in Mobberley aforesaid, and a like estate in the said hereditaments in South Lancashire. The deed was prepared by the solicitor of R. H. Hargreaves, the grantor, and was received by one of the claimants from such solicitor a few days before it was produced at the court aforesaid. Before the execution of the conveyance, the claimants had, by the permission of the grantor, depastured their horses on the said closes in Mobberley, and had continued to do so subsequently to the date of

*164] *the deed ; and the grantor had also continued to depasture his cattle thereon since the date of the conveyance, and had never paid, or agreed to pay, rent to his sons for the closes. The yearly value of the closes in Mobberley was 36*l.*

The conveyance was made by the grantor to the two claimants *princi-*

pally for the purpose of entitling them to be registered as voters as aforesaid, but with a view also of making a provision for them.

It was objected that this transaction was fraudulent, being for the mere purpose of creating votes; and that the conveyance came within the operation of the statute 7 & 8 W. 3, c. 25, s. 7, and was void.

The revising barrister decided that the names of the claimants should be retained upon the register: and his decision upon the points of law in question was, first, that the deed was not void on the ground of fraud; secondly, that it was not void under the 7 & 8 W. 3, c. 25, s. 7.

If the Court of Common Pleas shall be of opinion that the said decisions, or either of them, were or was wrong, then the names of the said Robert Hargreaves and Samuel Hargreaves are to be expunged from the register. If otherwise, the appeal is to be dismissed.

The case was argued on a former day in this term.(a)

Cockburn, (with whom was *Kinglake*, Serjt.,) for the appellant, admitted that this case was in no respect distinguishable from *Alexander*, app., *Newman*, resp., antè, p. 122, save that the consideration for the conveyance was not a pecuniary one.

Granger, for the respondent, submitted, that the transaction in question did not fall within the 7 & 8 W. 3, c. 25, s. 7; it being perfectly immaterial whether the consideration was pecuniary, or natural love and affection, so long as the conveyance was *bonâ fide* on the part of the grantor; and that the statute of 10 Ann. c. 23, was not the less to be considered as a legislative exposition of the statute of William, because its operation was limited to boroughs. [*165

Cur. adv. vult.

TINDAL, C. J., now delivered the opinion of the court:

This case also stood over to await the determination of that of *Alexander*, app., *Newman*, resp., antè, p. 122. We think the decision of the revising barrister, that the two names mentioned in the case should be retained on the register, is a right decision, and we affirm the same. This case is so far distinguishable from all the former, that, in this, the transaction is not that of purchase and sale, nor is the consideration that of money. But this is a conveyance by a father to his two sons, in consideration of natural love and affection. But, inasmuch as the law acknowledges the consideration of natural love and affection in the case of father and son to be as good a consideration to raise a use as a pecuniary consideration between strangers, and as no fraud in fact is found by the barrister, and as we are not to infer it from any circumstances stated in the case, all we have to do is, to consider the question reserved for us, viz., whether the conveyance is void by reason of the statutes; and upon this point we come to the same conclusion as before.

Decision affirmed.

(a) Jan. 19, before Tindal, C. J., and Maule, Cresswell, and Erie, Js.

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*COUNTY OF LANCASTER, SOUTHERN DIVISION.

CHARLES EDWARD RAWLINS, Appellant, HENRY BREMNER,
Respondent. Jan. 29.

See the marginal note to *Alexander, app., Newman, resp.*, antè, p. 122.

JAMES PECK, John Peck, Joseph Sutton Peck, Samuel Peck, and William Peck, whose names appeared in the list of persons claiming to vote in the election of members of parliament for the southern division of the county of Lancaster, in respect of one-fifth share of a house situate in Rupert Place, Bath Street, in the township of Liverpool, were severally objected to as not being entitled to have their names retained in the said list. The names of all the claimants were struck out of the said list by the revising barrister, subject to the opinion of this court on the following case:—

The claimants, who are brothers, being desirous of obtaining qualifications to vote for south Lancashire, made application, in the month of January last, to certain parties, to procure for them freehold premises for this purpose; but, not succeeding in obtaining any suitable purchase, their father, Watson Peck, by indenture dated the 18th of January last, conveyed the house in Rupert Place (being part of other property there situate, of which the father was owner) to the claimants, as tenants in common in fee. The purchase-money was stated in the deed to be 48*l.*; which sum was paid by the sons to the father. The house produces a rent of 12*l. per annum*, which the claimants have been in the receipt of since the conveyance to them.

The revising barrister was of opinion, from the evidence, that the *sole* *167] object of the claimants in buying the *house, was, to procure for themselves votes, and multiply voices for members of parliament for the southern division of Lancashire, and for that purpose to divide their interest in the house amongst themselves; and that the *sole* object of their father in selling them such house, was, to enable them to do so: and he held such conveyance to be void for this purpose under the 7 & 8 W. 3, c. 25, s. 7.

The case was argued on a former day in this term.(a)

Crompton, for the appellant, contended that this was a case of *bond fide* sale and purchase, and that the transaction was not vitiated by the intention on the one side to confer, and on the other to acquire, the franchise, which he submitted was a very proper, or at least an innocent, object of ambition, and neither prohibited by the common law, nor made illegal by any statute. He referred to the various authorities already cited in the argument on the part of the appellant in *Alexander, app.*,

(a) Jan. 19, before Tindal, C. J., and Maule, Cresswell, and Erle, Ja.

Newman, resp., antè, p. 122, and also the case of *Doe d. Roberts v. Roberts*, 2 B. & Ald. 367.

Arnold, for the respondent, insisted that the case was within the 7 & 8 W. 3, c. 25, s. 7, and commented on the several authorities referred to in the argument for the respondent in *Alexander*, app., *Newman*, resp., antè, p. 122. [CRESSWELL, J. There is no provision in the 2 W. 4, c. 45, or the 6 & 7 Vict. c. 18, against *letting* a house or land for the express and avowed purpose of conferring a vote: and the statute of William could not apply to leaseholders, who for the first time acquired a right to vote under the reform act.] They would probably come within the equity of the statute of William.

**Crompton* was heard in reply.

Cur. adv. vult.

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TINDAL, C. J., now said: In this case, in which the revising barrister held the conveyance made under circumstances substantially the same as those in the case of *Alexander*, app., *Newman*, resp., to be void, by reason of the 7 & 8 W. 3, c. 25, s. 7, we think the decision wrong, and reverse the same accordingly.

Decision reversed.

CITY OF LONDON.

WILLIAM COOK, Appellant, WILLIAM ENDELL LUCKETT,
Respondent. Jan. 29.

A. was rated as the occupier of a house, No. 3, Golden Lane, but by mistake inaccurately described as No. 4: the rates were paid, under an agreement, by the landlord; and A. had paid all his rent:

Semble, that this was not an "inaccurate description of the premises," within the 6 & 7 Vict. c. 18, s. 75; but a sufficient rating of A. within the 2 W. 4, c. 45, s. 27.

And, held, that the insertion of A. in the rate was a *bonâ fide* calling upon him to pay, and the payment by the landlord a *bonâ fide* payment by A. within the former statute.

WILLIAM ENDELL LUCKETT duly objected to the name of William Cook being retained on the list of persons entitled to vote in the election of members for the city of London in respect of the occupation of a "house, No. 4, Golden Lane," in the parish of St. Giles without Cripplegate.

The said William Cook also duly claimed to have his name inserted in the said list in respect of the occupation of a "house No. 3, Golden Lane," in the same parish.

The revising barrister expunged the name of William *Cook from the said list, and disallowed the claim, subject to an appeal to the Court of Common Pleas upon the following case:—

The qualification of the appellant was duly proved in respect of the occupation of a house No. 3, Golden Lane, except as to the sufficiency of the rating. He was rated to all the poor-rates, as the occupier of No. 4, Golden Lane; [but he did not occupy No. 4; and he was inserted in

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the rate-book for No. 4, by a mistake of the overseer.(a)] He held the house No. 3 at an annual rent of 27*l.*, and had an express agreement with his landlord that the latter should pay all the rates and taxes in respect of the premises. His landlord had called upon him to pay, and he had paid all the rent due in respect of the house. And the landlord had been called upon to pay, and had paid all poor-rates due in respect of the house.

It was contended on behalf of the appellant, that, though the premises so occupied by him were inaccurately described in the poor-rate, yet that he was the person liable to be rated for the premises, and had (by his landlord specially constituted by his agreement as his agent in that behalf) been *bonâ fide* called upon to pay, and had *bonâ fide* paid all the rates due in respect of such premises, within the meaning of the seventy-fifth section of the 6 & 7 Vict. c. 18, and therefore that he was to be considered as having been rated and as having paid all rates in respect of the said premises, notwithstanding the inaccurate description in the said rate of the said premises so occupied by him.

The revising barrister decided that this was an inaccurate description, within the 6 & 7 Vict. c. 18, s. 75 ; but that the facts proved did not show *170] that the appellant had been *bonâ fide* called upon to pay, and had **bonâ fide* paid, the rates due in respect of such premises.(b)

If the court shall be of opinion that the said decision was wrong, the name of the appellant is to be inserted in the said list of voters as follows :—

William Cook.	3, Golden Lane.	House.	3, Golden Lane.
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Welsby, for the appellant. Two questions were raised before the revising barrister—the first, whether the rating of the appellant as the occupier of “No. 4, Golden Lane,” when in point of fact he was the occupier of No. 3, was an inaccurate description of the premises occupied by him, within the latter branch of the seventy-fifth section of the 6 & 7 Vict. c. 18,(c)—the second, *whether, if it were so, the appellant had *171] been *bonâ fide* called upon to pay, and had *bonâ fide* paid all the

(a) This was added, in court, by the revising barrister, during the argument.

(b) This paragraph before amendment stood thus :—“The revising barrister decided that the appellant had not been *bonâ fide* called upon to pay, and had not *bonâ fide* paid, the rates due in respect of such premises.

(c) Which, reciting that doubts had arisen how far any misnomer or insufficient or inaccurate description in a rate of the person occupying any such premises as in the recited act (2 W. 4, c. 45, s. 27) are mentioned, or any inaccurate description of the premises so occupied, has the effect of preventing any such person from being registered and entitled to vote in respect of such premises in any year, declares and enacts, “that where any person shall have occupied such premises, as in the said recited act are mentioned, for twelve calendar months next previous to the last day of July in any year, and such person, being the person liable to be rated for such premises, shall have been *bonâ fide* called upon to pay, in respect of such premises, all rates made for the relief of the poor in such parish or township during the time of such his occupation so required as aforesaid, and such person shall have *bonâ fide* paid, on or

rates due in respect of such premises, within the meaning of the same section. He was in fact rated, and did in fact occupy premises of sufficient value to be entitled to vote; and by the special agreement with his landlord, who had paid the rates, he was to be looked upon as the person by or for whom the rates were paid: *Wright*, app., *The Town-Clerk of Stockport*, resp., 5 M. & G. 33, 7 Scott, N. R. 561; *Hughes*, app., *The Overseers of Chatham*, resp., 5 M. & G. 54, 7 Scott, N. R. 581. [MAULE, J. No doubt a payment by any person will enure as a payment by the person rated.] Then, has he been *bonâ fide* called upon to pay the rates? The landlord has been called upon, and has paid the rates: and the tenant has been called upon to pay, and has paid the rent due under his agreement. As payment of the rates by the landlord is equivalent to payment by the tenant, it clearly must be sufficient that the landlord has been called upon to pay them.

W. R. Grove, for the respondent. There is nothing on the face of the case to show that the rating of the appellant in respect of No. 4 was a mistake, and if it was a mistake, it was one that the barrister had no power to correct. [The case was, by the direction of the court, handed over to the revising barrister, who was present, for amendment in this respect. Accordingly, the amendments before referred to were made by him.] The amendments being made, the sole remaining question is, whether a calling on the landlord to pay is a calling upon the tenant within the meaning of the 6 & 7 Vict. c. 18, s. 75; for, it cannot be now contended *that an actual payment by the landlord will not enure as a payment by the tenant. In order to entitle an occupier to a vote, where his landlord is rated, the party must bring himself within the provisions of the 2 W. 4, c. 45, s. 30, antè, p. 91, by demanding to be rated. That implies that a personal rating of the occupier is necessary. If the seventy-fifth section of the 6 & 7 Vict. c. 18, is to receive a similar construction, a personal rating would seem to be required; the object being, that the overseer may know upon whom he is to call. This is virtually decided by the case of *Moss*, app., *The Overseers of St. Michael, Litchfield*, resp., 7 M. & G. 72, 8 Scott, N. R. 832. There, A. occupied jointly with B.: in the poor-rate B. alone was assessed as occupier: A. *bonâ fide* paid the rates with his own hand, but without being called upon: and it was held that A. was not rated, and that the omission of his name was not cured by the 6 & 7 Vict. c. 18, s. 75. [MAULE, J. There, the party was not rated in any way: here, he is upon the rate. Is he not by the proclamation of the rate "called upon to pay" the rate?] He is thereby called upon in

before the 20th day of July in such year, all sums of money which he shall have been called upon to pay as rates in respect of such premises for one year previously to the 6th day of April then next preceding, such person shall be considered as having been rated and paid all rates in respect of such premises, within the meaning of the said recited act, and be entitled to be registered in respect of the same in any year, any misnomer or inaccurate or insufficient description in any rate, of the person so occupying, or of the premises occupied, notwithstanding."

respect of No. 4. [TINDAL, C. J. By mistake for No. 3: that is mere matter of evidence. [MAULE, J. Are not the words "called upon" satisfied by the name of the party being in the rate as a person who is to pay the money?] Clearly not. In *Cullen v. Morris*, 2 Stark. N. P. C. 577, a *personal* demand was held necessary. [MAULE, J. That was the case of a scot and lot voter. No doubt, under the 2 W. 4, c. 45, s. 27, if the party is accurately placed upon the rate, and pays it, he is entitled to vote. Here, he has paid. The question is, whether he has been *173] called upon to pay, within the 6 & 7 Vict. c. 18, s. 75.] That section *must mean something more than the twenty-seventh section of the former act.

Welsby, in reply, was stopped by the court.

TINDAL, C. J. The alteration that has been made in the case, and in the statement of the question for our opinion, has relieved us from all difficulty. It appears that the barrister thought the mistake of the overseers in inserting the appellant as the occupier of No. 4, instead of No. 3, brought the case within the 6 & 7 Vict. c. 18, s. 75, as being an inaccuracy of description that was amendable. I almost doubt that any amendment was necessary at all. The only question, however, remaining for us to deal with, is, whether the appellant has been *bonâ fide* called upon to pay rates in respect of the premises occupied by him, and whether he has *bonâ fide* paid them. The facts of the case show that the tenant was rated; that he held the premises under an express agreement with his landlord that the latter should pay all rates and taxes; that the landlord had called upon him to pay, and that he had paid, all the rent due; and that the landlord had been called upon to pay, and had paid, all poor-rates due in respect of the house. It appears to me, that, the tenant being rated, under these circumstances, the calling upon the landlord to pay, and the payment by him, are equivalent to a *bonâ fide* calling upon the tenant to pay, and a *bonâ fide* payment of the rates by him. I cannot understand why any formal call or personal demand should be necessary. The tenant being on the rate, he was the only person who, by law, could be called upon to pay. He was liable to a distress for it. No greater notoriety could be given to the demand by calling at his door. He is to *174] pay either *in crumenâ* or *in personâ*. I think *the words of the seventy-fifth section are satisfied, and that the decision of the revising barrister was wrong.

MAULE, J. I think, also, that the appellant in this case was *bonâ fide* called upon to pay, and has *bonâ fide* paid the rates in respect of the premises occupied by him, within the 6 & 7 Vict. c. 18, s. 75. I also incline to think that the vote might properly be allowed upon the true construction of the 2 W. 4, c. 45, s. 27, without the assistance of the seventy-fifth section of the subsequent act. The twenty-seventh section confers the franchise upon the occupier of a 10*l.* house: it requires not merely that he shall hold himself out as an occupier, but that he shall submit

himself to the parochial burdens; and, to effect that purpose, the section requires that he shall be rated, and that he shall have actually paid rates. We have had several cases before us as to what is a sufficient payment of rates. It was, at first, contended that the payment must be by the party's own hand. Generally speaking, the payment of money is a thing that is, of all others, the least necessary to be done by the hand of the party himself. There cannot be the smallest doubt that, where one gets another person to pay the rate for him, and allows it in account, that is a good payment by the party rated. The legislature, by *bonâ fide* payment, probably meant to exclude a gratuitous payment by a candidate. I am clearly of opinion that there has been here a complete payment by the party rated within the 2 W. 4, c. 45, s. 27, as well as within the 6 & 7 Vict. c. 18, s. 75. The main question, however, is, whether the appellant has been *bonâ fide* "called upon to pay," within the latter clause, s. 75. That section is not necessarily introductory of new law. It may be, that it helps some cases to which the twenty-seventh section of the former act would not apply. Its object was to remove the obscurity and obviate the *doubts that had been suggested upon the 2 W. 4, c. 45, s. 27, to enable the revising barrister more easily to arrive at the same conclusion that he ought to have arrived at under the last mentioned section. I apprehend the inaccuracy here is much the same as if a house were described as the "Black Lion," instead of the "Red Lion," which, I conceive, would have been within the twenty-seventh section of the reform act. The absence of the words "*bona fide*" throws some light upon the seventy-fifth section of the 6 & 7 Vict. c. 18: it imports a substantial instead of a mere formal compliance with the requirements of the act. The object of inserting a party's name in a rate, is, to warn him of the amount he is called upon to pay to the overseers. The seventy-fifth section of the 6 & 7 Vict. c. 18, says, in effect, that any inaccuracy in the description of the premises or the person rated, is to be cured, not in all cases, but in those where the substance of the twenty-seventh section of the former act has been complied with. It may be, and I incline to think it is so, that a rate so defective that it does not show who the party is that is rated, might be helped by something *dehors* the rate itself. If the insertion of the name of a party in a rate as liable to pay a certain sum, and the publication of such rate, be not a *bonâ fide* calling upon him to pay the rate, I am at a loss to conceive what would be. The revising barrister seems to have thought a visit at the house of the party necessary. In this he was clearly wrong. The amount of the rate has been disbursed by the appellant, and received by the persons entitled to receive it; and, therefore, he has *bonâ fide* paid, as well as been *bonâ fide* called upon to pay, the rate, within the meaning of the statute.

CRESSWELL, J. I also am of opinion that the appellant, in this case, was entitled to have his name *inserted in the register. [*176

I very much doubt whether it was necessary to introduce the seventy-fifth section of the 6 & 7 Vict. c. 18, into the present discussion. The facts are, that the party occupied No. 3, and was rated *in respect of* No. 3, though the house was inadvertantly described as No. 4. He has, therefore, complied with the twenty-seventh section of the 2 W. 4, c. 45, by being rated. The rates have been paid by his landlord, who, in consideration of his engagement to pay them, has received from him an increased rent. After the case of *Hughes, app., The Overseers of Chatham, resp.*, it is impossible to contend that that is not a sufficient payment of rates by or on behalf of the tenant. But, assuming the matter to be at all doubtful, all doubt is removed by the 6 & 7 Vict. c. 18, s. 75. I incline to think, that, if the rating were such as to call upon the party to pay, that would be sufficient under the 2 W. 4, c. 45, s. 27, and that the subsequent provision, which is *declaratory* as well as *enacting*, was unnecessary. If he was *bonâ fide* called upon to pay, and has *bonâ fide* paid the rates, he is to be considered as rated, notwithstanding any misnomer or inaccuracy of description: and, if rated, and the overseers intended (a) to call upon him to pay, and he submits by paying the amount, whether by his own hand, or by the hand of another, he is clearly within the seventy-fifth section.

ERLE, J. I also think that the barrister erred in excluding the name of the appellant. It appears to me, that, if a party is put upon a rate with intent (a) to make him liable, he is *bonâ fide* called upon to pay the rate, within the meaning of the 6 & 7 Vict. c. 18, s. 75. And I also think there has, in this case, been a sufficient payment of the rate by the appellant.

Decision reversed.

(a) But see *Pariente, app., Lockett, resp.*, post, p. 177.

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*CITY OF LONDON.

JOSHUA PARIENTE, Appellant; WILLIAM ENDELL LUCKETT,
Respondent. Jan. 29.

In consequence of a claim made by A., an occupying tenant, his name was inserted in a rate, immediately after that of his landlord, who was duly rated in respect of the same premises.

All the columns opposite A.'s name were left blank, and it was no otherwise connected with that of his landlord than by its juxtaposition:—

Held, that A. was sufficiently rated.

And held that the revising barrister ought not to have been influenced by a statement of one of the overseers that A.'s name was so inserted without any *intention* to rate him; but should have decided upon the construction of the rate itself, irrespectively of any extraneous evidence.

WILLIAM ENDELL LUCKETT duly objected to the name of Joshua Pariente being retained on the list of persons entitled to vote in the election of members for the city of London, in respect of the occupation of a

"house, No. 18 Coleman Street," in the parish of St. Stephen, Coleman Street.

The revising barrister expunged the name of the said Joshua Pariente from the said list, subject to an appeal to the court of Common Pleas upon the following case :—

The qualification of the appellant was duly proved in all respects, except as to the sufficiency of the rating.

Five poor-rates were made in the said parish in the year ending the 31st of July, 1845. The first rate was made on the 17th of October, 1844 ; the second rate, on the 17th of January, 1845 ; the third rate, on the 8th of April, 1845. The dates of the subsequent rates are not material. Thomas Haynes, the landlord of the house, was rated, and paid all the rates in respect thereof. The appellant was not rated to the said October rate, nor did his name in any way appear thereon.

On the 1st of January, 1845, a claim to be rated in respect of the house was served, on behalf of the appellant, upon the overseers of the parish ; and at that time no rate was due in respect of the house.

* At the time the assessment to the said January rate was made out, the appellant was not rated thereto, nor did his name appear upon such last-mentioned rate ; but afterwards, and before the declaration at the foot of the said last-mentioned rate was signed by the churchwardens and overseers pursuant to the provisions of the 6 & 7 W. 4, c. 96, the name of the appellant was inserted by interlineation upon the said rate between the name of the said Thomas Haynes and that of another party rated for other premises, but without any brace or other connecting mark, and without any particular premises or amount of rating being carried out in the several columns referring to such particulars. [*178

The rate in this respect was in the following form :—

				£	£	
2	Thomas Haynes.	House.	18, Coleman Street.	67	50	&c.
3	Joshua Pariente.					
	A. B. (another party.)	House.	&c. &c.	&c.	&c.	&c.

The name of the appellant was inserted in a similar manner upon the said April rate, and the subsequent rates ; but upon a separate line, and not as an interlineation ; and such last-mentioned insertions were made at the time the assessment was made out.

One of the parochial officers stated that the name had been so placed upon the rate in consequence of the claim so made by the appellant, but without any intention to rate him for any thing.

The revising barrister decided that the appellant was not rated to the said January rate, and the subsequent rates.

If the court shall be of opinion that the decision was wrong, the name of the appellant is to be re-inserted in the said list of voters, as follows:—

Joshua Pariente.	Coleman Street.	House.	18, Coleman Street.
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*179] *The cases of twenty-five other parties, which were decided upon the same point of law, are consolidated with the principal case.

Welsby, for the appellant. No question arises as to the rate made on the 17th of October, 1844, as to which there was clearly a sufficient claim within the 2 W. 4, c. 45, s. 30, antè, p. 91. The only question presented for the opinion of the court, is, upon the twenty-seventh section, as to which the case of *Wright*, app., *The Town Clerk of Stockport*, resp., 5 M. & G. 33, 7 Scott, N. R. 561, is decisive. The court called on—

W. R. Grove, for the respondent. In the case cited the names of the landlord and of the various tenants were joined with a brace. [TINDAL, C. J. Though there is virtue sometimes, as Lord Coke observes, in an &c., I doubt whether you will find authority for saying there is any in a brace.] The overseers never meant to rate the appellant. [TINDAL, C. J. Can they be permitted to say that? The party claims to be inserted in the rate, and they put his name upon it. MAULE, J. There can be no doubt that he might have been compelled to pay the rate.] The case of *Moss*, app., *The Overseers of Lichfield*, resp., 7 M. & G. 72, 8 Scott, N. R. 832, is in point. There A. occupied jointly with B.: in the poor-rate, B. alone was assessed as occupier: A. *bonâ fide* paid the rates with his own hand, but without being called upon: and it was held that A. was not rated, and that the omission of his name was not cured by the 6 & 7 Vict. c. 18, s. 75. Here, if it had been the intention of the overseers to rate the appellant in respect of the house No. 18, Coleman Street,

*180] a “ditto,” (a) or something equivalent, would have been *added in each column, as in the form in the parochial assessment act, 6 & 7 W. 4, c. 96. [MAULE, J. Is not a blank equivalent to a ditto? TINDAL, C. J. The question is, whether this is not to be read as if all the particulars had been carried out in the same way as in the preceding line.] The effect of the evidence on the revising barrister was, that the party was not properly rated. It is rather a question of fact than of law. [CRESWELL, J. Not strictly so. In one sense, it is a question of fact whether or not an agreement has been executed: but, if it be admitted that the party did sign the instrument, then it is a question of law, whether it amounts to an agreement or not.] At the most, it is an inaccurate description, which might have been amended under the 6 & 7 Vict. c. 18, s. 75; and that was never suggested.

Welsby, in reply, was stopped by the court.

TINDAL, C. J. I think all the information derived by the revising barrister from the overseer as to what the intention was, must be thrown overboard; and that we are bound to give the rate a reasonable construction, as we would do to any other instrument. In the second column of the rate we find the name of Haynes, and opposite to his name, in the other columns, we find the premises occupied by him, their rateable value, and other particulars: then follows immediately the name of the appellant, without those particulars, all the columns opposite his name being left blank. Now, his name must have been inserted in the second column with some object: and I think we must read it as if all the particulars in the preceding line had been repeated, or we must consider Haynes and the appellant to be jointly rated in respect of the premises described. That seems to me necessarily to follow from the numbers in *the margin, No. 2 applying to Haynes and the appellant, and No. 3, [*181 to the party whose name immediately follows. It seems to me that it is only in this way that we can give any sense to the rate; and that therefore the decision of the revising barrister must be reversed.

MAULE, J. I am of the same opinion. With respect to the first rate, it is conceded that the party did enough to entitle himself to the benefit of the 2 W. 4, c. 45, s. 30. (a) With regard to the subsequent rates, the question is whether or not he was actually rated; and that is to be determined by looking at the rate itself. The revising barrister seems to have been embarrassed by something said by one of the overseers. The construction, however, of the rate is to be ascertained quite irrespectively of the opinions or intentions of the overseers. The intention of the overseers has as little to do with the matter as would a statement by a subscribing witness to a bond, that the obligor signed and sealed it, but without any intention to make himself liable to pay the money. The construction I put upon this rate is the same as if all the columns opposite the name of the appellant had been filled up with several particulars inserted opposite the preceding name. Leaving blanks is just as effective and good as inserting "ditto" (b) in each place.

CRESSWELL, J. Looking at the extract from the rate-book set out in the case, I think we are bound to hold that the appellant was properly rated. The figures in the first column denote the subject-matter of the rate. Placed as it is here, I think the name of the appellant could only have been intended to be inserted for the *purpose of connecting [*182 him with the preceding subject-matter of rate.

ERLE, J. Finding an interlineation in the rate-book, the revising barrister was justified in requiring an explanation of the *circumstances* under which it was made. But he should not have allowed his judgment to be influenced by any thing that was said by the overseer as to his *intention*

(a) Except that he did not make "continual claim." See *Wansey, app., Perkins, resp., (Lackey's case),* 7 M. & G. 145, 8 Scott, N. R. 970.

(b) Vide *antè*, p. 87, note (a).

in placing the appellant's name on the rate. It was his duty to construe it as he would have done any other written instrument. Looking at the manner in which the name is placed, I have no doubt that it was intended to apply it to the subject-matter of rate in the preceding line. The effect unquestionably would be, to render the appellant liable to be called upon for the rate. I therefore agree with the rest of the court in thinking that the decision of the revising barrister must be reversed.

Decision reversed.

CITY OF LONDON.

HENRY COOGAN, Appellant, WILLIAM ENDELL LUCKETT, Respondent. Jan. 29.

"The clear yearly value" of premises, under the 2 W. 4, c. 45, s. 27, is matter of fact to be determined by the revising barrister upon the evidence before him.

The proper criterion of value seems to be, the amount for which the premises would fairly let, the tenant bearing the ordinary burdens incident to the occupation.

WILLIAM ENDELL LUCKETT duly objected to the name of Henry Coogan being retained on the list of persons entitled to vote in the election of members for the city of London, in respect of the occupation of a "house, 4, Red Cross Passage, in the parish of St. Giles-without-Crip-legate."

*183] *The revising barrister expunged the name of the said Henry Coogan from the said list, subject to an appeal to this court upon the following case:—

The qualification of the appellant was duly proved in all respects, except as to the value of the house occupied.

The rent paid by the appellant for the house in question was 4s. 9d. *per week*, amounting to 2l. 7s. *per annum*. The landlord paid all the rates and taxes assessed upon the house. The landlord of the house [was also the owner or lessee of other houses in the said passage, which houses were also let at weekly lettings; and he (a)] compounded for his poor-rates [for all such houses, and also for the house so occupied by the appellant; and the said landlord] was assessed in the poor-rate book in respect of the said house, at 5l. *per annum*.

[It was not shown that there was any local act authorizing such composition; but it was assumed to have been made under the 59 G. 3, c. 12, s. 19.]

The rates commonly known as tenants' rates, payable in this parish, amounted to 5s. 11d. in the pound *per annum*, viz.: poor-rates 3s., consolidated rate 1s. 4d., police-rate 7d., and church-rate 1s.

[It was proved that the said house, if the same were rated to the tenant, would be assessed at the rate or value of 8l. *per annum*; on

(a) The passages within brackets were inserted by the revising barrister, upon the case being remitted to him for amendment.

which assessment the tenants' rates would amount to *2l. 7s. 4d. per annum.*]

It was contended, on behalf of the appellant, that no other rates or taxes, except the poor-rate and window-tax, ought to be deducted from the amount of rent actually paid, in order to ascertain what was the "clear annual value" of the house within the meaning of the *twenty-seventh section of the 2 W. 4, c. 45; and, secondly, that, if all [*184 the tenants' rates were to be deducted, yet that such deduction should be made only for the amount for which the premises were assessed to the landlord, viz. *5l.*, and not upon the rent actually paid by the tenant; and that no greater amount than that which the landlord was actually called upon to pay could legally be deducted.

The revising barrister [was of opinion that the "clear annual value" of premises must be taken to mean the rent at which they might reasonably be expected to let for, from year to year, free of all usual tenants' rates and taxes, at least, (see 6 & 7 W. 4, c. 96, s. 1;) that is, the rent which the landlord would, in such case, receive; but, inasmuch as there was no evidence before the revising barrister to enable him to ascertain what the house would let for, under such circumstances, he considered] that the proper principle of ascertaining the "clear annual value" of the house in question was, to deduct from the rent paid by the appellant, viz. *12l. 7s.*, the amount of "tenants' rates and taxes" calculated upon [the rateable value of the said house, if assessed to a tenant,] viz. *2l. 7s. 4d.*, and, therefore, that the said house was not of the "clear yearly value" of *10l.*

If the court shall be of opinion that the decision was wrong, and that either of the principles of calculating the value contended for on behalf of the appellant was correct, the name of the appellant is to be re-inserted in the said list of voters, as follows:—

Henry Coogan.	Red Cross Passage.	House.	4, Red Cross Passage.
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Welsby, for the appellant. The principle upon which the revising barrister calculated the "clear yearly value" of the premises, was erroneous. If it means the value *to the landlord, as was held in the *Woodstock* case, (a) the value here was more than *10l.* Whether any [*185 deduction is to be made on account of repairs or insurance, may be doubtful. (b) [MAULE, J. Are deductions on these accounts mentioned in the statute?] They are not. [MAULE, J. I should say the legislature meant that the party should be entitled to vote, if he were of ability to occupy a house of the yearly value of *10l.*, and to pay rates and taxes.]

(a) *Prior's case*, Falc. & Fitz. 453.

(b) See *Cotvill*, app., *Wood*, resp., post, p. 210, where this point is decided in the negative.

The additional burdens to be borne by the tenant are not to go in diminution of the value.

W. R. Grove, for the respondent. "Clear yearly value" means value to the tenant. Whatever the amount of taxes, if paid by the landlord, they are to be deducted from the rent. [ERLE, J. The value is, what the tenement would fairly let for, the tenant paying the rates and taxes.] In *The King v. Chaplin*, 1 B. & Ad. 926, TAUNTON, J., says: "The tolls of a canal, like the profits of land, are to be valued at what they would let for *communibus annis*; and it has, I believe, been held, that no difference is to be made, because in one particular year there was a loss. In ascertaining what a property is worth to let, the best criterion, in general, is, what it actually does let for."

TINDAL, C. J., after referring to the 2 W. 4, c. 45, s. 27, said: What is the clear yearly value of the premises must be a question of fact to be determined by the revising barrister upon the evidence before him. Here, he has decided that the value is not sufficient to confer a vote; and, upon the facts stated, I am unable to discover that he has decided improperly.

*186] *MAULE, J. The case finds facts that have a bearing upon the question of value. The question is, what is the house worth by the year. That is to be ascertained by looking at the benefits to be enjoyed, and at the losses and burdens to be borne. The revising barrister has drawn a conclusion of fact from a statement of facts; and we cannot see that his conclusion is wrong. He talks about a principle; but it is not a principle of law, but a mere mode of ascertaining the fact. The only rule of law is, that, in order to ascertain the value, you must consider all the circumstances.

CRESWELL, J. The clear yearly value is, what the house would let for, over and above the ordinary burdens to which a tenant would be liable who took it subject to such burdens.

ERLE, J. The value is entirely a question of fact. But I agree with the revising barrister, that the true test of annual value is, what would the premises fairly let for, under ordinary circumstances. The principle that obtains in the settlement cases is applicable here. In those cases, the rateable value has generally been considered the sum for which the premises would fairly let to a tenant bearing the public burdens cast by law upon him.

Decision affirmed.

CITY OF LONDON.

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**WILLIAM ENDELL LUCKETT, Appellant, PHILIP LIONEL
KNOWLES, Respondent. Jan. 29.**

Held, that, where a voter's place of abode is untruly stated in the list, the barrister has power to insert it correctly, under the 6 & 7 Vict. c. 18, s. 40.

And *semble*, per Maule, J., that the place of abode is no part of the qualification.

WILLIAM ENDELL LUCKETT duly objected to the name of Philip Lionel Knowles being retained on the list of persons entitled to vote in the election of members for the city of London, in respect of property occupied within the parish of St. Margaret, Lothbury.

The revising barrister retained the name of Philip Lionel Knowles upon the said list, subject to an appeal to this court upon the following case:—

The name of the respondent appeared upon the list as follows:—

Name.	Place of abode.	Nature of Qualification.	Street, &c., where Property situate, &c.
Philip Lionel Knowles.	Greenwich.	Counting-house.	1, Bank Chambers.

The only point in the case was, as to the power of the revising barrister to alter the place of abode of the respondent, as described in the list.

The respondent's place of abode was at Queen Square, Bloomsbury, and not at Greenwich. Both Greenwich and Queen Square are within seven miles of the city of London. The respondent required the revising barrister to alter the place of his abode as described in the said list; but it was contended, on behalf of the appellant, that the revising barrister had no power to do so, inasmuch as the place of abode was an essential part of the description of the qualification of the respondent, which the revising barrister was not at liberty to change, under the fortieth section of the 6 & 7 Vict. c. 18. [*188

The revising barrister decided that the place of abode was no part of the description of the qualification of the respondent, and that the erroneous statement of the place of abode was a mistake in the list, which, under the said section, the revising barrister had power to correct; and he altered the place of abode accordingly.

If the court shall be of opinion that the decision of the revising barrister was wrong, the name of the respondent is to be expunged from the list.

W. R. Grove, for the appellant. The place of abode of the voter is part of his qualification; and, assuming that it is not, still it is a matter, the erroneous statement of which is not amendable under the 6 & 7 Vict.

c. 18, s. 40, antè, p. 21. In *Bartlett*, app., *Gibbs*, resp., 5 M. & G. 81, 7 Scott, N. R. 609, it was held, that, if a party whose qualification consists in the occupation of several premises in immediate succession, is registered only in respect of the premises in his occupation at the time of making out the list of voters, it is such a misdescription of his qualification as the revising barrister has no power to correct, under the 6 & 7 Vict. c. 18, s. 40.(a) The whole object of the act, as is there observed, would be frustrated "if the omission of any part of the qualification could be remedied at the court of revision." *Tudball*, app., *The Town Clerk of Bristol*, resp., 5 M. & G. 5, 7 Scott, N. R. 486, is also an authority to show that accuracy of description is essential. Here, the *189] description is not *merely insufficient: it is wholly false. [MAULE,

J. When the place of abode is wholly omitted, or is insufficiently described, the barrister is to expunge the name of the party from the list, unless the matter so omitted or insufficiently described be supplied to his satisfaction, in which case he is to insert the same in the list. If the barrister may amend in the case of a total omission, surely he may amend in the case of a misdescription.] A total omission could not mislead: but the description of the qualification cannot be altered. [MAULE, J. The place of abode is no part of the qualification.] The fortieth section applies only, as was observed by TINDAL, C. J., in *Wood*, app., *The Overseers of Willesden*, resp., antè, p. 15, to any slight and unimportant blunder, by which no person could be misled, and by the correction of which no person could be prejudiced. Here, the misdescription is of such a nature that it cannot fail to mislead.

Welsby, for the respondent, was not called upon.

TINDAL, C. J. It appears to me that the power of amendment given to the revising barrister by the 6 & 7 Vict. c. 18, s. 40, is sufficiently large to warrant the amendment made in this case. That section, so far as it relates to the voter's place of abode, applies to two cases only—a case of total omission, and a case of insufficient description; in both of which the barrister is required to expunge the name of the party: but it goes on to provide, that, if whilst the revision is proceeding, the matter so omitted or insufficiently described is supplied to his satisfaction, he shall insert the same in the list. It is conceded, that, in the case of a total omission, the *190] *barrister may amend: but it is contended that insufficiency of description must be limited to cases where the place of abode is inserted without sufficient particularity, and does not extend to cases like the present, where it is altogether erroneous. I think it is impossible for any one to say that the description here is any other than an insufficient one. And I do not see why we should narrow the construction of a clause, which was meant to be fairly and liberally interpreted, and which seems to me to be reasonably adapted to comprehend the present case. I think the revising barrister's decision must be affirmed.

(a) See *Hutchins*, app., *Brown*, resp., antè, p. 25.

MAULE, J. I also am of opinion that the name of the respondent was properly retained upon the list of voters. The name was upon a list on which the revising barrister was bound to retain it, unless the circumstances rendered it his duty to expunge it. Now, the only ground upon which he was called on to expunge it, was, that the respondent's place of abode was erroneously stated to be "Greenwich," when in fact it was "Queen Square, Bloomsbury." The party's name appearing regularly on the list, the barrister could not expunge it without sufficient cause. It was necessary for the respondent to prove his qualification as stated in the list. He did so. Then it is said the place of abode is part and parcel of the qualification. That I do not admit. The party may have resided in several places: it clearly would not be necessary to insert them all in the register. The present case, therefore, does not fall within that part of the fortieth section which empowers the barrister to expunge the name on the ground of the insufficiency of the description of the qualification. If the voter's name is to be expunged at all, it is not because no qualification is stated, or because the qualification is insufficient in *point of law; [*191 but the power to expunge, if it exist at all, arises under the subsequent part of the clause, which imposes that duty upon the revising barrister, in cases where the place of abode is *wholly* omitted or insufficiently described for the purpose of being identified. And then the power to expunge is conditional—"unless the matter or matters so omitted or insufficiently described, be supplied to the satisfaction of such barrister before he shall have completed the revision of such list, in which case he shall then and there insert the same in such list." Here, the matter so omitted or insufficiently described, was so supplied to and inserted by the barrister. I therefore think the case clearly comes within that part of the section; though I very much doubt whether there exists any other power to amend, if the matter be not supplied to the satisfaction of the barrister.

CRESSWELL, J. It is to be observed that the fortieth section begins with a power to the barrister to correct mistakes. That may mean either a general power to correct mistakes, or it may be limited to those mistakes, omissions, and misdescriptions that are afterwards pointed out. It then goes on to provide, that, wherever the Christian name, place of abode, &c., of the voter shall be wholly omitted, or insufficiently described for the purpose of identification, the name of the party shall be expunged from the list, unless the matter so omitted or insufficiently described is supplied pending the revision; in which case the barrister is to amend by inserting it. When a wrong place of abode is given, the case either is or is not within the latter part of the section. If it is not within it, the barrister had no power to expunge the name of the voter: if it is, he had power to make the amendment he did. **Quæcunque viâ*, there- [*192 fore, the barrister did right in retaining the respondent's name on the list. I think it was a case of insufficient description.

ERLE, J. I also think the revising barrister was right. The principal object of the fortieth section was, to prevent a *bond fide* qualification from being defeated by reason of a mere mistake. The section starts with a very general power to amend mistakes. Without deciding (though I am inclined to think we have already done so) that the barrister had power to make an amendment like this under that part of the section, he clearly had that power under the subsequent part, which authorizes him to expunge the name of the party from the list, where his place of abode is either wholly omitted or insufficiently described for the purpose of identification. I see no reason why a misstatement of the party's place of abode should not be within the words, as it seems to me to be within the spirit of the section. The law is a remedial one, and ought therefore to receive a liberal construction.

Decision affirmed.

*193]

*CITY OF LONDON.

WILLIAM ENDELL LUCKETT, Appellant; JOHN BRIGHT, Respondent. Jan. 29.

Six persons were joint lessees of a house which they and others used for the purposes of a political association. The rent, and the wages of the servants who had charge of the premises, were paid out of a common fund, to which the lessees and the other members of the association were subscribers. Various members of the association transacted the business of the association upon the premises; and the lessees, when in London, frequented the premises, partly transacting the business of the association, and partly transacting their own affairs.

The revising barrister having decided upon these facts, that the lessees occupied the premises as tenants within the 2 W. 4, c. 45, s. 27, and that the same were not jointly occupied by them and the other members of the association as tenants:—

The court affirmed his decision.

WILLIAM ENDELL LUCKETT duly objected to the name of John Bright being retained upon the list of persons entitled to vote for members of parliament for the city of London, in respect of the occupation of "a house, No. 67, Fleet street," in the parish of St. Dunstan in the West.

The revising barrister retained the name of John Bright upon the said list, subject to an appeal to this court upon the following case:—

The respondent, together with Richard Cobden, and four others, were the joint lessees of the house, 67, Fleet street, under a demise for a term of three years from the 29th of September, 1843, in consideration of the payment of a premium of 150*l.*, and a yearly rent of 200*l.* The said lessees were the only persons appearing as contracting parties with the lessor, or liable to him for the rent; and there was no mention in the lease of any other parties, or of the purposes for which the premises were taken. But it appeared in evidence that the whole of the premises were used for the purpose of a voluntary association of persons styling themselves "The

"National Anti-Corn-Law League." More than twenty other parties, members of the association, subscribed various sums of money to a common fund, for the purpose of carrying out the objects of the association. The respondent and his said co-lessees were also subscribers to the said common fund. The rent of the premises was paid out of the said fund, as were also the various servants of the association who had charge of the premises. Various members of the association transacted the business of the association upon the premises; and the respondent and his co-lessees, when in London, frequented the premises, partly transacting the business of the association, and partly transacting their own affairs. [*194]

It was contended, on the part of the appellant, that the respondent and his co-lessees did not occupy the house *as tenants* within the meaning of the twenty-seventh section of the 2 W. 4, c. 45; or that, if they did, the same was jointly occupied by them and the other members of the association as tenants, and then that the clear yearly value of the premises, divided by the number of the said occupiers, would not give a sum of not less than 10*l.* for each and every such occupier, within the meaning of the twenty-ninth section of the statute.

The revising barrister decided that the respondent and his co-lessees *did* occupy the premises "as tenants," and that the same were not jointly occupied by them and the other members of the association as tenants.

If the court shall be of opinion that the said decision was wrong, the name of the said John Bright is to be expunged from the list.

W. R. Grove, for the appellant. The respondent and the other five joint-lessees did not occupy the premises in question as tenants. A man cannot be said to occupy premises, unless he is personally resident there by himself or by some third person as his agent or servant. [*195] In *The King v. The Inhabitants of Ditchet*, 9 B. & C. 176, 4 M. & R. 151, LITLEDALE, J., says: "There is a material difference between a holding and an occupation. A person may hold though he does not occupy. A tenant of a freehold is a person who holds of another; he does not necessarily occupy. In order to occupy, a party must be personally resident by himself or his family." And in *The King v. St. Nicholas, Rochester*, 5 B. & Ad. 219, 3 N. & M. 21, the same learned judge observed: "What I am reported to have said in *Rex v. Ditchet*, as to the meaning of the word *occupation*, applies to a constructive occupation only, which was sufficient to satisfy the statute that governed that case." Does this case disclose even a constructive occupation, or any thing like a possessory control exercised by the co-lessees? If they occupied at all, it was jointly with a large number of persons, members of the league. [CRESSWELL, J. The case discloses no trust under which the members of the association might, of right, come upon the premises.] It shows that the premises were used for the purposes of the association, and that the

rent was paid out of its funds. All the cases that have hitherto been decided have gone upon the footing of there having been something like an exclusive occupation. [TINDAL, C. J. I think there are sufficient *indicia* of occupation found by the barrister.]

Welsby, for the respondent, was not called upon.

TINDAL, C. J. The question here is, whether we can see that the barrister was wrong in the decision he has come to, or whether, upon the facts found by him, we feel ourselves bound to come to a contrary conclusion. *The case finds that the respondent and his co-lessees *196] were clothed with the character of tenants. The only question is, as to the mode of occupation. It appears that they were sometimes there—that they, when in London, “frequented the premises, partly transacting the business of the association, and partly transacting their own affairs.” I cannot say that this was not such a user of the premises as to amount to an occupation by themselves or their agents. I therefore think the decision must be affirmed.

MAULE, J. I am of the same opinion. The barrister has found that the voter occupied as tenant. It appears that the premises are let to six persons, of whom the voter is one; that the user of them was by these six persons and others associated with them; and that the persons who had charge of the premises were the servants of an association of which the lessees, and many others, were members. The rent and the servants’ wages were paid out of the funds of the association. Upon this state of facts, the barrister has come to the conclusion that the respondent and his co-lessees occupied the premises as tenants. I cannot say that he has drawn an unreasonable conclusion from the facts.

CRESSWELL, J. I also think the barrister did right in retaining the names of the respondent and his co-lessees on the list of voters. The question is, whether the materials he had before him justified him in so deciding. It is clear the parties were tenants of the premises: the only question is, whether or not they *occupied* them. It does not appear that they have parted with the right they possessed as lessees, to turn out any one who came there, or that the other members of the association had any right to come upon the premises against their will. It is said that the rent and the servants’ wages were paid out of a common fund contributed by the lessees *and many other members of the association, and that the premises were occupied by those servants. But there is nothing in the case to show that these individuals were not there as the agents or servants of the respondent and his co-lessees. And it appears that the respondent and his co-lessees were in the habit of resorting to the house for their own private purposes, and of transacting their own business there. On these grounds I think the decision was right.

ERLE, J. I also think the decision of the revising barrister was right. I am not aware of any definition of the term “occupation” which would exclude the kind of user here found.

Decision affirmed.

HILARY VACATION.

CITY OF LONDON.

HENRY WILLIAM JUDSON, Appellant; WILLIAM ENDELL LUCKETT, Respondent. Feb. 23.

"Part of a house" is a sufficient statement of the qualification of a borough voter, under the 2 W. 4, c. 45, s. 27.

In consequence of a claim made by A., an occupying tenant, his name was inserted in a rate, immediately after that of his landlord, who was duly rated in respect of the same premises.

All the columns opposite A.'s name were left blank, and it was no otherwise connected with that of his landlord than by its juxta-position:—

Held, that A. was sufficiently rated.

WILLIAM ENDELL LUCKETT duly objected to the name of Henry William Judson being retained on the list of persons entitled to vote in the election of members for the city of London, in respect of the occupation of "part of a house," 22, Cannon street, in the parish of St. Swithin, London Stone.

*The revising barrister expunged the name of the said H. W. Judson from the said list, subject to an appeal to this court upon the following case:— [198

It was contended on behalf of the respondent, that the qualification of the appellant, as stated in the said list, was insufficient in law to entitle him to a vote, and therefore the revising barrister must expunge the name of the appellant under the fortieth section of the 6 Vict. c. 18; and, on behalf of the appellant, that the qualification, as stated in the said list, was sufficient, or, if not, the description of the premises in the occupation of the appellant, as part of a house, was a mistake, which could be proved to have been made in the said list, which mistake the revising barrister, by the same section, had power to amend. The revising barrister thereupon received evidence of the actual nature of the appellant's qualification; and it was proved that he occupied as a place of residence the upper part of the said house and the kitchen, having a distinct and separate entrance thereto, of the key whereof he had the exclusive possession. His landlord occupied the ground floor as a shop, having a distinct and separate entrance thereto. The appellant's name was in all the poor-rates made in the said parish, in the year ending 31st of July, 1845, under that of his landlord; but nothing was carried out against the name of the appellant, nor were the names of the appellant and his landlord connected by brace or otherwise in the rate-book. The assistant-overseer of the parish stated in his evidence, that it was the intention of the overseers in putting the appellant's name on the rate-book, to rate him.

It was further contended on behalf of the respondent, that the appellant was not rated to the relief of the poor. The revising barrister decided that the qualification of the appellant, as stated in the said list, was

*199] insufficient in law to entitle him to vote, and that he, the *revising barrister, had no power to change the description of the said qualification; and further, that the appellant was not duly rated. If the court should be of opinion that the said decision was wrong upon both points, the name of the appellant was to be re-inserted in the said list of voters, as follows:—

William Henry Judson.	22, Cannon street.	House.	22, Cannon street.
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The case was argued in Hilary term last. (a)

Welsby, for the appellant. The decision of the revising barrister was wrong upon both points. The description of the appellant's qualification was sufficient to entitle him to be registered, and there was no necessity for any amendment. The case of *Wright*, app., *The Town-Clerk of Stockport*, resp., 5 M. & G. 33, 7 Scott, N. R. 561, is an authority to show that the exclusive occupation of a room will, under certain circumstances suffice. And *Score*, app., *Huggett*, resp., 7 M. & G. 95, 8 Scott, N. R. 919, decided that the occupier of part of a house, who has a key of the outer door, the landlord not residing in or occupying any portion of the premises, is entitled to vote. MAULE, J., in that case thought "apartments" a sufficient description. [MAULE, J., referred to *Sweetman's case*, 1 Alcock's R. C. 27.] Assuming, however, that the description here "part of a house" is insufficient, it is either a mere mistake or an insufficient description of the nature of the qualification, which was supplied to the satisfaction of the barrister before he had completed the revision of the list, and therefore he had no power under s. 40 to expunge *200] the *appellant's name. In the course of the argument in *Daniel*, app., *Camplin*, resp., 7 M. & G. 167, 8 Scott, N. R. 995, TINDAL, C. J., observed—"The barrister may alter the *description* of the premises:" and CRESSWELL, J., asked—"Suppose in the list a qualification was stated to be 'a house,' and it turned out to be a 'warehouse,' might not the barrister alter that description?" With respect to the rating—assuming, as we must from the statement made, that, so far as concerned the landlord, all the columns of the rate were properly filled up, and finding that the appellant's name was put on the rate for the express purpose of charging him, it is quite clear that he is duly rated, notwithstanding the absence of a brace, or other connecting link, between his name and that of his landlord.

W. R. Grove, for the respondent. The qualification of the appellant as stated in the list was clearly insufficient; and the case is not one to which the power of amendment conferred by section 40 can apply. The rating also is insufficient. The judgment of TINDAL, C. J., in *Daniel*, app., *Camplin*, resp., shows that, in the opinion of that learned judge.

(a) Before Tindal, C. J., and Maule, Cresswell, and Erie, J.

the present description would not do. *Hitchins*, app., *Brown*, resp., ante, p. 25, also shows that a general description of the qualification is sufficient: as also does the case of *Daniel*, app., *Coulsting*, resp., 7 M. & G. 122, 8 Scott, N. R. 949. So here, "part of a house" is not found as a description given in the 2 W. 4, c. 45, s. 27. [TINDAL, C. J. In *Pitts*, app., *Smedley*, resp., 7 M. & G. 85, 8 Scott, N. R. 907, the qualification was described as "part of a house," and no objection was taken.] The qualification as stated being insufficient, the barrister was bound, under sect. 40, to *expunge the name of the appellant: there is [201 nothing in the subsequent part of the clause to qualify that express direction. As to the rating—*Wright*, app., *The Town Clerk of Stockport*, resp., is a very different case from the present. It is expressly found there that all the parties were rated; and the whole of the names were connected with a brace. Here the appellant is precluded from calling in aid the 6 & 7 Vict. c. 18, s. 75, for, it does not appear that he has either been called upon to pay or has paid the rate. *Moss*, app., *The Overseers of St. Michael, Lichfield*, resp., 7 M. & G. 72, 8 Scott, N. R. 832, is a stronger case. There, A. occupied jointly with B.: in the poor-rate B. alone was assessed as occupier: A. *bonâ fide* paid the rates with his own hand, but without being called upon: and it was held that A. was not rated, and that the omission of his name was not cured by the 6 & 7 Vict. c. 18, s. 75.

Welsby was heard in reply.

Cur. adv. vult.

TINDAL, C. J., now delivered the opinion of the court.

In this case the nature of the qualification in respect of which the appellant claimed to vote, appeared on the list of voters made out by the overseers as "part of a house." The revising barrister held the description to be insufficient, and the first question reserved for our determination is, whether such description was sufficient in point of law. We have already held, in more than one instance, that there may be an occupation of a part or a portion of a house so completely separated from the residue as to constitute the occupation of a house as tenant, within the meaning of the twenty-seventh section of the statute 2 W. 4, c. 45; and *in this case no question is raised as to the occupation being [202 sufficiently separate in that respect, but solely on the point whether the description of the qualification on the list is sufficient; and we think it is sufficient. The description is precisely true, in fact, according to the common understanding of the words, and still may denote such a house as will confer, and, as we must take it in this case, does confer a qualification. It becomes, therefore, unnecessary to consider the second point reserved, namely, whether the revising barrister had the power of amending under the fortieth section of the registration act. The third point reserved was as to the rating. It appeared that the landlord occupied one part of the house and the appellant the other, (no question being before us as to the sufficiency of the occupation,) and that the

landlord's name was on the rate, with the house opposite to his name, and the appellant's name under that of the landlord; but nothing was carried out against the name of the appellant, nor were the names connected by bracket or otherwise, and on this state of facts the barrister held the appellant not to be properly rated. But we think upon these facts it appears, that the name of the appellant is on the rate as a person charged, and that a rate so made would be construed to charge the appellant in respect of the premises inserted opposite to the landlord's name in the line above, just as effectually as if the word "ditto" had been inserted, or a brace had been used. We therefore think the decision of the revising barrister is wrong on both of these points, and that it must be reversed, and the name of the appellant restored to the list.

Decision reversed.(a)

*203] *COUNTY OF CHESTER, NORTHERN DIVISION.

JAMES NEWTON, Appellant; The Overseers of the Township of MOBBERLEY, Respondents. Feb. 23.

A waiver by the respondent of the notice to him required by the 6 & 7 Vict. c. 18, s. 64, will not enable the court to entertain the appeal in his absence.

A *bonâ fide* grant of a rent-charge by a father to his son, expressed to be made in consideration of natural love and affection, is not within the 7 & 8 W. 3, c. 25, s. 7, though the intention of the grantor be to create a vote.

Whether or not there is fraud in the making of a grant, is a question of fact, which must, in all cases, be decided by the revising barrister: the court will not infer fraud.

JAMES NEWTON objected to the name of John Wright being retained on the list of claimants to have his name inserted in the list of voters for the northern division of the county of Chester, in respect of the qualification following:—

Christian and surname of each voter.	Place of abode.	Nature of Qualification.	Street, lane, &c.; or, if the qualification consists of a rent-charge, then names of owners, &c.
John Wright.	Mobberley.	Freehold rent-charge of 2 <i>l.</i> 2 <i>s.</i>	House and land in Heald Mill Lane belonging to James Wright.

A deed was produced, dated 30th of January, 1845, made between James Wright (the father of the claimant) of the one part, and John Wright, the claimant, of the other part, by which, after reciting that the

(a) See *Pariente, app., Luckett, resp.*, *anté*, p. 177.

said James Wright was seised in fee of a certain messuage, &c., in the township of Mobberley, he, (the said James Wright,) in consideration of the natural love and affection which he bore towards his son, (the said John Wright the claimant,) granted unto the claimant, his heirs and assigns, a yearly rent of 2*l.* 2*s.*, to be yearly issuing out of the said messuage, &c., payable half yearly on the 30th of June and 30th of December in each year, the first payment to be made on the 30th of June then next, *with powers of distress in case the said rent should be in arrear. [*204

The grantor was at the time of the said grant, and still is, tenant of a farm belonging to the father of one of the members of parliament for the said northern division of the said county of Chester, and a few days before the day of the date of the said deed, the grantor was at the house of the said landlord, with the land steward of the latter, when instructions were given by the grantor to his said landlord's attorney to prepare the before-mentioned deed, which he did, and delivered it to the said land steward, who attended at the grantor's house at Mobberley on the day of the date of the said deed, and got it executed by both the parties thereto, and attested it. The said deed was left in the possession of the said grantor, and the claimant received it from his custody to produce at the said registration court. The first half year's rent, due 30th of June, had been duly paid to the grantee. The object of the said grantor, in creating the said rent-charge, was to entitle the said claimant to be registered as a voter for the said northern division of Chester, and such object was mentioned by the said grantor at the time the instructions for the said deed were given. It did not appear that the said grantee had, previously to or since the execution of the said deed, entered into any engagement as to the manner in which he should exercise his right of voting when entitled thereto. It was objected, that, under the above circumstances, the said transaction was void on the ground of fraud; and was also within the statute 7 & 8 W. 3, c. 25, being for the sole purpose of "multiplying voices," and that the said deed was therefore also void.

The decision of the revising barrister upon the whole case was, that the name of the said John Wright should be retained upon the said list; and his decision upon the point of law in question was, that the said *transaction was not void on the ground of fraud; and that the said deed was not void under the provisions of the statute referred to. [*205

If the court shall be of opinion that these decisions were wrong, then the name of John Wright is to be expunged from the said list: if otherwise, this appeal is to be dismissed.

The case came on for argument on the 17th of November last, when *Cockburn* appeared for the appellant; but, no one appearing on behalf of the respondent, and there being no affidavit of notice of the appellant's intention to prosecute the appeal, as required by the 6 & 7 Vict. c. 18, s. 64, the court declined to hear the argument.

On the 20th of November, *Cockburn* produced an affidavit, stating that the notice had been waived by agreement of the parties.

TINDAL, C. J. The question is, whether we are not bound by the very stringent words of the sixty-fourth section, which enacts that "no appeal shall be heard by the court in any case where the respondent shall not appear, unless the appellant shall prove that due notice of his intention to prosecute such appeal was given or sent to the respondent ten days at least before the day appointed for the hearing of such appeal." As, however, the appellant has been lulled into security by the supposed waiver, I think we may allow the matter to stand over, by virtue of the proviso, that, "if it shall appear to the court that there has not been reasonable time to give or send such notice in any case, it shall be lawful for the court to postpone the hearing of the appeal in such case, as to the said court shall seem meet."

The case accordingly stood over until the 15th of January, 1846.

*206] *Cockburn*, (with whom was *Kinglake*, Serjt.,) for the appellant. This case, like *Alexander*, app., *Newman*, resp., ante, p. 122, turns upon the construction of the 7 & 8 W. 3, c. 25, s. 7, which might as well be expunged from the statute-book, unless this case is within it. The deed was prepared at the house of the member, and was left in the grantor's possession. Upon the face of it, therefore, the transaction was a fraud upon the statute. [CRESSWELL, J. That is merely evidence of fraud, but the revising barrister has negatived fraud. TINDAL, C. J. We cannot infer fraud.]

No counsel appeared on behalf of the respondent.

Cur. adv. vult.

TINDAL, C. J., now delivered the opinion of the court.(a)

In this case the revising barrister appears to have reserved two questions for the court—first, whether the circumstances attending the making of the grant of the rent-charge are such as to show the grant to be void, as founded upon *fraud in fact*—secondly, whether it is void, as being made for the purpose of splitting freeholds and multiplying voices at elections, in violation of the statute 7 & 8 W. 3, c. 25, s. 7.

As to the first point—fraud in the making of the grant itself—we think the revising barrister must, in all cases, find the fact one way or the other for himself, such and such fraud not being a question of law, to be referred to the court. Indeed, it is to be observed, in this particular case, that he has expressly stated his own opinion to be that there was *no fraud in fact*.

*207] As to the second point, we think the case falls directly *within the rule laid down by us in the case of *Alexander*, app., *Newman*, resp., ante, p. 122, and consequently, hold the grant not to fall

(a) The judges present at the argument of this and the following case, were Tindal, C. J. and Cresswell and Erle, Js.

within the statute. The decision of the revising barrister must therefore be affirmed.

Decision affirmed.

COUNTY OF CHESTER, NORTHERN DIVISION.

JAMES NEWTON, Appellant; The Overseers of the Township of CROWLEY, Respondents. Feb. 23.

A bonâ fide grant of a rent-charge by a man to his son and his son-in-law, expressed to be made for a nominal consideration only, is not within the 7 & 8 W. 3, c. 25, s. 7, though *all of the parties* contemplated the creation of votes.

JAMES NEWTON duly objected to the following names being retained on the list of persons entitled to vote for the township of Crowley, in the northern division of the county of Chester, in respect of the qualifications therein and hereinafter described :—

Christian and surname of each voter.	Place of Abode.	Nature of Qualification.	Street, Lane, &c.; or, if the qualification consists of a rent-charge, then names of owners, &c.
James Pickup.	Church Street, in Blackburn, in the county of Lancaster.	Rent-charge.	Charged upon an estate at Crowley, in Over Whitby, in the county of Chester, belonging to John Lord, Esq., and in the occupation of William Earle as tenant.
John Pickup Lord.	Standish Hall, in the county of Lancaster.	Rent-charge.	Charged upon an estate at Crowley, in Over Whitby, in the county of Chester, belonging to John Lord, Esq., and in the occupation of William Earle as tenant.

*A deed was produced, dated 23d of January, 1845, made between John Lord of the one part, and the said two claimants [208 of the other part, reciting that the said John Lord was seised in fee of two equal undivided fifth parts of and in certain hereditaments therein described, in the township of Crowley, and that, being so seised, he, the said John Lord, had agreed to grant unto John Pickup and John Pickup Lord, the claimants, a yearly rent-charge of 5*l.*, to be issuing out of the said two equal undivided fifth parts of the said hereditaments; and by the said deed it was witnessed, that, in pursuance of the said agreement,

and in consideration of 10s., &c., by James Pickup and James Pickup Lord to John Lord paid, the said John Lord did grant to James Pickup and James Pickup Lord, their heirs and assigns, a yearly rent-charge of 5*l.*, to be issuing out of the said two undivided fifth parts of the said hereditaments, payable half-yearly, the first payment to be made on the 12th of May then next ; with power of distress to recover the said rent-charge if in arrear. This deed was proved by the attesting witness thereto to have been executed by John Lord, the grantor, who is an attorney, on the day of the date thereof, having been prepared in his office, but the grantees were not present at the time. The deed was kept in the custody of the grantor, together with other deeds belonging to the said James Pickup Lord, one of the claimants, and was now produced therefrom. The only consideration expressed in the deed was nominal ; and there was no proof of any other consideration, or that the grantees had received the said rent-charge or any part thereof. The grantor was the father of one of the claimants, and the father-in-law of the other. The property out of which the rent-charge was granted was of sufficient value
 *209] to entitle the said grantees to vote. The object *of the said parties to the said deed was thereby to entitle the said claimants to be registered as voters for North Cheshire. It was objected that the said grant of the said rent under the above circumstances was void on the ground of fraud ; and that it was a transaction for the sole purpose of “multiplying voices,” and within the provisions of the seventh section of the 7 & 8 W. 3, c. 25, and therefore also void.

The decision of the revising barrister upon the whole case was, that the names of the said claimants should be retained on the said list ; and his decision upon the points in question was, that under the circumstances proved, the transaction was not void on the ground of fraud, and that the deed was not made void by the statute 7 & 8 W. 3, c. 25, s. 7.

If the court shall be of opinion that these decisions, or any of them, were or was wrong, then the names of the claimants or claimant are or is to be expunged from the said list : if otherwise, the appeal is to be dismissed.

The same difficulty arose in this case, as to the absence of an affidavit of service of the notice of prosecution of the appeal, as in the last case, and it, in like manner, stood over until the 15th of January, when

Cockburn, (with whom was *Kinglake*, Serjt.,) for the appellant, observed, that the only distinction between this and the preceding case was, that here the revising barrister has found that *both* parties were cognisant of the object of the grant ; and that there was no proof that any portion of the rent-charge has been paid.

No counsel appeared on behalf of the respondent. *Cur. adv. vult.*

*210] *TINDAL, C. J., now said : This case arises upon facts substantially the same as those of the last case ; and, for the reasons there given, we think the decision of the revising barrister must be affirmed.
 Decision affirmed.

BOROUGH OF CHATHAM.

GEORGE COLVILL, Appellant; CHARLES WOOD and Others, Overseers of CHATHAM, Respondents. Feb. 23.

The proper criterion of "clear yearly value," within the 2 W. 4, c. 45, s. 27, is, the fair annual rent, without making any deduction on account of repairs or insurance.

GEORGE COLVILL, on the list of voters for the borough of Chatham, duly objected to George Huben and William Jolley, on the same list, as not being entitled to have their names retained on such list.

It appeared that each of them, the said Huben and Jolley, claimed to be so entitled, in respect of a house in the parish of Chatham, and that they had respectively occupied such houses during the required period, at the yearly rent of 10*l.*, exclusive of rates and taxes, and that there was no special agreement between them and their respective landlords as to repairs and insurance. It further appeared that the said rent of 10*l.* was, in each case, the fair rent of the premises.

In support of the objections, it was contended that the proper measure of the "clear annual value" of a house, within the meaning of the 2 W. 4, c. 45, s. 27, was, not the rent for which such house would let to a tenant, but the amount of such rent after deducting therefrom the average annual expense of landlord's repairs and insurance; and, consequently, that the houses in question were not of the clear annual value of 10*l.*

*The revising barrister, however, was of opinion that the fair annual rent was the proper criterion of value, without any such deduction; and, the right of the said parties to be retained on the list being established in all other respects, they were retained accordingly. [*211]

The names of fifteen other persons were, upon the same state of facts, inserted in the lists for the parishes of Chatham and Gillingham respectively, and their cases consolidated with the principal case.

The case was argued in Hilary term last.(a)

Kinglake, Serjt., for the appellant. The decision of the revising barrister is erroneous. The rent is not the true criterion of value. "Clear yearly value" means that which comes to the hands of the landlord after deducting all reasonable disbursements, viz. for repairs and for insurance. In the earliest statute that speaks of value in relation to a vote, the 8 H. 6, c. 7, the right of voting is limited to those who possess "free land or tenement to the value of 40*s.* by the year, at the least, *above all charges*, and who *may expend* 40*s.* by the year, and above;" the test being, a profitable enjoyment of lands or tenements of the yearly value of 40*s.* The 10 H. 6, c. 2, contains a similar provision. The 18 G. 2, c. 18, s. 5, enacts that "no person shall vote, without having a freehold estate in the

(a) Before Tindal, C. J., and Maule, Cresswell, and Erle, Js.

county, of the *clear* yearly value of 40s. over and above all rents and charges payable out of the same. [CRESSWELL, J. That means, clear of all such charges as are afterwards mentioned.] It means the clear yearly value to the party claiming the franchise; therefore, a freeholder whose estate was mortgaged would not be entitled to vote, unless he had a clear yearly value of 40s. beyond the charge. Under the 2 W. 4, c. 45, *212] however, the meaning of "clear yearly *value" is different. The subject-matter of the occupation must be of the clear yearly value of 10*l*. There is, obviously, a distinction between "yearly value" and "clear yearly value;" the latter expression indicates that some deduction is to be made. The value must diminish, unless money is expended in repairs; and the premises may be utterly lost to the landlord, unless he insures them from fire. There are many settlement cases, under the 13 & 14 Car. 2, c. 12, s. 1, that show the gross rent not to be the fair criterion. In *South Sydenham v. Lamerton*, 1 Sess. Ca. 115, 1 Stra. 57, 2 Bott, 129, the court say: "The quantity of the rent is not material, but the value of the tenement. If there be a lease of land worth 10*l*. a year, and a fine be paid, or no rent reserved, yet if the tenement be worth 10*l*. a year, it makes a settlement; for, the settlement depends on the value of the tenement, and not on the rent." *The King v. Southwold*, Burr. S. C. 140, 2 Sess. Ca. 198, 2 Stra. 1127, 2 Bott, 131, is to the same effect. *The King v. Tomlinson*, 9 B. & C. 163, 4 M. & R. 169, and *The King v. Lord Granville*, 9 B. & C. 188, 4 M. & R. 171, also show that allowance is to be made for necessary repairs. In the last cited case, PARKE, B., says: "The sessions seem to have calculated the value of the premises according to the rent for which they might be let to an under-tenant. That, perhaps, may not be the proper principle upon which such property should be rated, because the annual value is only part of the annual rent, and a portion of the rent should be considered applicable to repairing and maintaining the machinery." And in *The King v. Tomlinson*, BAYLEY, J., says: "In the case of houses, the annual profit or value is always a part only of the annual rent paid to the landlord. Some portion of that rent ought to be set apart to form a fund for repairing or *213] building, *when necessary; in other words, to maintain or reproduce the subject of occupation." The 6 & 7 W. 4, c. 96, s. 1, may be taken to be a legislative exposition of the meaning of "clear yearly value." The expression there used is "net annual value," which must mean the same thing; and the interpretation given to it by the act is,—"that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes, and tithe-commutation rent-charge, if any, and deducting therefrom the probable average annual cost of the *repairs, insurance*, and other expenses, if any, necessary to maintain them in a state to command such rent." The rateable value would seem to be the fair criterion. It is difficult to lay down any other rule. [TINDAL, C. J. The revising bar-

risters has not found the state of repair to be such as to affect the annual value.]

No counsel appeared on the part of the respondent.

TINDAL, C. J. We will suspend our decision until we have heard the argument in *Coogan*, app., *Luckett*, resp., ante, p. 182.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court.

In this case the point of law reserved by the revising barrister for our determination was, whether, in the case of a person claiming the right to vote for a borough by reason of the occupation of a house as tenant, the fair annual rent was the proper criterion of value, without deducting therefrom the average annual expense of landlord's repairs; and we are of opinion that the revising *barrister was right in holding the [214 fair annual rent, without making such deduction, to be the clear yearly value within the meaning of the statute 2 W. 4, c. 45, s. 27.

It was, indeed, contended before the revising barrister, not only that the average annual value of the landlord's repairs should be deducted from the rent paid by the occupier, but the landlord's expense of insurance also. But this latter appears so plainly to be a voluntary charge on the part of the landlord, who, if he thinks right, may be, and very often is, his own insurer, that we declared our opinion in the course of the argument that the insurance never could be held a necessary deduction in order to ascertain the clear yearly value of the premises. And we think the same as to the deduction of the landlord's repairs.

This is the case of the occupier of a house as tenant, who pays a rent of 10*l. per annum* exclusive of rates and taxes, that is, so far as the tenant is concerned, a clear yearly rent to the landlord of 10*l. per annum*. But the statute requiring that the house must be of the clear yearly value of 10*l. per annum*, in order to confer a qualification, it is undoubtedly not enough to find that the tenant pays a rent of that amount; for it is manifest, such rent is not necessarily the measure of the true value; the rent may be exorbitant, and such as no other tenant would give; or it may have been fraudulently fixed at that sum in order to acquire the vote. It is necessary, therefore, in order to satisfy the statute, to show further that the house is of that clear yearly value, and for that purpose it is found in the case before us that 10*l. per annum* is the fair rent of the premises. And whether this is proof of the clear yearly value, is the question before us.

There is some difficulty in ascertaining the true meaning of the act in the use of this expression. Where the right to vote depended, as it did formerly, on property *only, there was no difficulty in discovering [215 the clear yearly value. Thus, where the statute 8 Hen. 6, c. 7, ordained that the knights of the shires should be chosen by people "whereof every one shall have free tenement to the value of 40*s.* by the year at the least above all charges;" and again, where the 18 G. 2, c. 18,

s. 5, has enacted that no person shall vote without having freehold "of the clear yearly value of 40s., over and above all rents and charges payable out of or in respect of the same;" it was easy to prove the yearly value to the owner, more especially when the sixth section of the latter act had defined the nature of the charges intended to be deducted, by enacting that "no public or parliamentary tax, nor any rate or assessment whatever, should be deemed to be any charge payable out of or in respect of any freehold estate within the meaning of the act." But, in the present case, the legislature has created a new qualification for voting; namely, that of the occupier, as tenant, of a house of the clear yearly value of not less than 10*l.*; applying to the case of the tenant a description or definition, which, in strictness of language, and under former enactments, belonged exclusively to the owner of the property. For, in strict propriety of language, although the rent may be a fair criterion of the value to the landlord, it cannot be so to the tenant; the value in the case of the latter depending on the use to which he puts it, the profit he makes by his occupation, and other circumstances that exist in each case, quite independently of his paying 10*l.* a year rent to the landlord. But we think it obvious the legislature could never have intended that the right of a tenant to vote should depend upon calculations so nice, artificial, and difficult of application. And although it may not be easy to give effect to all the words of the section, we think they may well bear *216] the *meaning, that where a house is occupied by a tenant at the clear annual rent of 10*l.*, if such house is fairly worth that rent to any one wanting to occupy it, if the house would generally fetch such rent, the occupation is that of a house of the clear yearly value of not less than 10*l.*, so far as the tenant is concerned. For, we think the legislature intended that any person who is in such a condition, both as to credit and circumstances, as to be allowed by the owner of a house which is fairly worth the clear sum of 10*l.* to rent by the year, to become his tenant thereof, is a fit person also to have a vote in the election of a member of parliament for a borough.

In the course of the argument we were referred to cases of rating under the settlement act, 13 & 14 Car. 2, c. 12. But we think the appellant can derive no benefit from those cases. The rateable value of property has generally been considered that which it would fairly let for, the tenant bearing all such public burdens as by law attach to his occupation. And in consequence of disputes as to the principle upon which properties more or less perishable should be rated, the statute 6 & 7 W. 4, c. 96, was passed, and that statute prescribed the mode of ascertaining the rateable value of all kinds of property, viz., that it should be the net annual value left, after making certain deductions specified in the act from the rent that could be obtained for it; and, if we had found in the 2 W. 4, c. 45, s. 27, the expression "rateable value," we must have ascertained such value by applying the rule laid down by the 6 & 7 W. 4, c. 96. But the

expression which we have to construe is "clear yearly value," without any direction as to the mode of ascertaining it. The consideration of these statutes, therefore, made entirely *diverso intuitu*, does not, as we conceive, militate against the principle we have laid down as [*217] that which ought to govern the interpretation of the twenty-seventh section of the 2 W. 4, c. 45. And, for these reasons, we think the decision of the revising barrister ought to be affirmed.

Decision affirmed.

COUNTY OF CHESTER, NORTHERN DIVISION.

JAMES MURRAY, Appellant; JOHN THORNILEY, Respondent.
Feb. 23.

The words "actual possession," in the 2 W. 4, c. 45, s. 26, mean a possession in *fact*, as contradistinguished from a possession in *law*. Therefore, a grantee of a rent-charge is not entitled to be registered, unless he has been in the *actual* receipt of it for six months before the last day of July.

JOHN THORNILEY objected to the names of James Murray and William McConnell being retained in the list of voters for the township of Stockport, in respect of the qualification following :

Name.	Place of Abode.	Nature of Qualification.	Where situate, &c.
James Murray.	Apsley Place, Ardwick, Manchester.	Undivided share of freehold rent-charge.	Giles Bury, Joseph Bury, and Thomas Speel, owners of the property out of which same is issuing: situation, No. 15, Higher Hill-gate, Stockport.
William McConnell.	The Polygon, Ardwick, near Manchester.	Undivided share of freehold rent-charge.	Giles Bury, Joseph Bury, and Thomas Speel, owners of the property out of which same is issuing: situation, No. 15, Higher Hill-gate, Stockport.

*218] *A grant and conveyance to the said James Murray and William McConnell, and their heirs, of a rent of 6*l.* 3*s.*, issuing out of freehold lands of adequate value, was produced, dated the 29th of January, 1845. This rent-charge had been created by a deed dated the 28th of January, 1845, by which it was granted as follows :—" One clear yearly rent-charge or sum of 6*l.* 3*s.*, on the 1st of January in every year, the first payment to become due and be made on the 1st of January then next ensuing."

It was objected, that a rent was an incorporeal hereditament, and as such was not capable of being possessed, except by the act of receiving ; or that, at all events, the claimants could not be said to be possessed, or in the actual receipt of the rent until it became due ; and that, inasmuch as the first payment of the said rent would not become due until the 1st of January, 1846, the claimants had not been possessed of the hereditaments in respect of which they claimed to be registered, for six calendar months previous to the last day of July, 1845, as required by the 2 W. 4, c. 45, s. 26.

The decision upon the whole case was, that the names of the said James Murray and William McConnell should be expunged from the list of claimants for the said township ; and the decision upon the point of law in question was, that the said claimants had not been possessed, or in the actual receipt of the said rent-charge in respect of which they claimed to be registered, for six calendar months next previous to the last day of July, 1845.

If the court shall be of opinion that the said decisions were wrong, then the names of the said claimants are to be inserted in the list of voters for the said township : if otherwise, then the appeal is to be dismissed.

*219] *The case was argued in Hilary term last.(a)
Cockburn, (with whom was *Kinglake*, Serjt.,) for the appellant. The question arises upon the 2 W. 4, c. 45, s. 26.(b) The rent-charge was created by a deed bearing date the 1st of January, 1845, though the grantee can receive no payment under it until the 1st of January, 1846. The grantee is possessed of the rent-charge from the moment he has an inchoate right. The object of the statute is sufficiently insured by such a

(a) Before Tindal, C. J., and Cresswell and Erle, J.

(b) Which enacts, " that notwithstanding any thing hereinbefore contained, no person shall be entitled to vote in the election of a knight or knights of the shire to serve in any future parliament, unless he shall have been duly registered according to the provisions hereinafter contained : and that no person shall be so registered in any year in respect of his estate or interest in any lands or tenements, as a freeholder, copyholder, customary tenant, or tenant in ancient demesne, unless he shall have been in the actual possession thereof, or in the receipt of the rents and profits thereof for his own use, for six calendar months at least next previous to the last day of July in such year, which said period of six calendar months shall be sufficient, any statute to the contrary notwithstanding ; and that no person shall be so registered in any year in respect of any lands or tenements held by him as such lessee or assignee, or as such occupier and tenant as aforesaid, unless he shall have been in the actual possession thereof, or in the receipt of the rents and profits thereof for his own use, as the case may require, for twelve calendar months next previous to the last day of July in such year," &c.

possession; and the court will not encourage any subtleties in its construction. Suppose a man purchase an estate, would he be the less possessed of it, because no rent might be payable by the tenants for a year from the execution of the conveyance? The grantee of the rent-charge is clearly as much possessed of the thing granted the moment the deed is executed, as he will be at the end of a year.

Welsby, for the respondent. The decision of the revising barrister is perfectly correct. There was no rent *due, nor had there been [*220 any receipt of any thing in the nature of rent under this deed, until after the registration. The framers of the statute clearly had not at the time incorporeal hereditaments in their minds: but the court will construe possession of a rent-charge to mean *actual seisin*; and it is submitted there can be no seisin of rent until the rent-day has arrived, or unless some payment has been made in anticipation. In *Gilbert on Rents*, p. 38, it is said: "A rent-charge and rent-seck differ only in this, that the grantee has a remedy for the recovery of the former without an *actual seisin*, but not for the latter." And in a subsequent part, (a) speaking of the remedy, the learned author says: "This writ of assize restores the party to the actual seisin in the freehold; * * * and consequently, the party that brings this writ must found it upon an *actual seisin*, of which he has been divested, for otherwise this remedy is not commensurate to his case. * * * There must be an actual seisin of the rent in the case of rent services to ground an assize, because this is a remedy for the restitution of the freehold of which the party was once in seisin or possession. * * * Therefore, if there be lord and tenant by rent-service, and the lord grants the services to another, and the tenant attorns by a penny, and the grantee afterwards distrains for the rent in arrear, and the tenant rescues the distress, yet the grantee shall have no assize for the rent, but a writ of rescue, because the penny was given in the name of attornment, which only shows the tenant's concurrence to the grant, and that he is willing to pay the rent when it becomes due to the grantee, as he formerly did to his first lord. But, as such concurrence or approbation of the tenant only obliges him to pay the rent when it becomes due; but does not give *the grantee an actual seisin before it is paid [*221 him, consequently there can be no disseisin of a thing of which a man was never in possession. But, if the penny had been given by way of seisin of the rent, that had been sufficient to ground an assize, because here the grantee is put in possession of the rent by the tenant himself; and therefore, if the possession be violated, the grantee may have his assize, which is the proper method or remedy to restore that possession." [TINDAL, C. J., referred to Comyn's Digest, tit. *Seisin* (C.), where the older authorities are collected.] Many authorities are also to be found in Brooke's Abridgment, tits. *Assize* and *Seisin*, and also in Viner's Abridgment, tit. *Seisin* (A.). This may also be tested by the application of the

doctrine of *possessio fratris*. Lord COKE, commenting on the words of the eighth section of Littleton, "*Seisie de terres en fee-simple*," says:(a) "These words exclude a seisin in fee-tail, albeit he hath a fee-simple expectant. And therefore, if lands be given to a man and his wife, and to the heirs of their two bodies, the remainder to the heirs of the husband, and they have issue a son, and the wife dieth, and he taketh another wife, and hath issue a son, the father dieth, the eldest son entreth, and dieth without issue, the second brother of the half-blood shall inherit; because the eldest son by his entry was not actually seised of the fee-simple, being expectant but only of the fee-tail. And the rule is, that *possessio fratris de feodo simplici facit sororem esse hæredum*, and here the eldest son is not possessed of the fee-simple, but of the estate-tail. And, where Littleton speaketh only of lands, yet there shall be *possessio fratris* of an use, of a seignory, a rent, an advowson, and of other hereditaments." The 3 & 4 W. 4, c. 27, applies to incorporeal hereditaments: under that act the period of limitation would commence from the last legal *222] rent-day, or the last receipt of rent; and the same construction must be put upon this act. The reform act does not recognise inchoate rights.

Cockburn, in reply. Actual seisin is not necessary. A seisin in law is sufficient to sustain a distress,(b) and all that can be required to satisfy the words of this act: it is enough if the grantee has a complete title to the rent-charge for a period of six months before the last day of July. The effect of grants of this sort as qualifications to vote, was considered under the 3 G. 3, c. 24, which is now repealed. That act was intituled "An act to prevent fraudulent and occasional votes in the elections of knights of the shire and of members for cities and towns which are counties of themselves, so far as relates to the right of voting by virtue of an annuity or rent-charge:" and s. 3 enacted that no person should vote in respect thereof, unless a memorial of the *grant* of such annuity or rent-charge should have been registered twelve calendar months before the election. All that that act, like the present, intended to secure, was, that the *grant* should have been in existence a given time.

Cur. adv. vult.

TINDAL, C. J., now delivered the opinion of the court. In this case the claim to the right to vote was made in respect of a freehold rent-charge. The rent-charge was created by deed, bearing date the 28th of January, 1845, by which the same was made payable on the 1st day of January in every year, the first payment to become due and be made on the 1st day of January, 1846. The objection taken before the revising *223] barrister was, that the claimant had no title to be put *upon the register, inasmuch as he had not been "in the actual possession, or in the receipt of the rents and profits for his own use for six calendar

(a) Co. Litt. 14, b.

(b) Com. Dig. Seisin (B.).

months at least next previous to the last day of July" next preceding the registration, as required by the twenty-sixth section of the 2 W. 4, c. 45. The revising barrister allowed the objection, and directed the name of the claimant to be expunged; and, after the argument which has been heard, it appears to my brothers CRESSWELL and ERLE, and to myself, that the decision of the revising barrister is right. My brother MAULE, not having been present during the whole of the argument, declines giving any opinion.

It was contended on the part of the appellant, that he had the complete right to the rent-charge from the time of the execution of the deed by which it was granted, and that he had the actual possession also within the meaning of the statute, because he had all the possession of which the subject-matter is capable before the first day of payment had actually arrived. The question undoubtedly turns upon the meaning of the words "actual possession;" and we think those words mean a possession in fact, as contradistinguished from a possession in law; and that, as the possession in fact of a rent-charge must be the actual manual receipt of the rent itself, or some part of it, or of something in lieu of it, so there could be no such possession in fact in this case, where the first payment of the rent did not become due until after the expiration of the month of July, and where nothing whatever took place but the mere execution of the deed. There is a long course of authorities fully establishing the distinction between a possession or seisin in fact of a rent-charge, and a possession or seisin in law. Littleton, § 235, is an authority in point: "And so it is, if a man grant by his deed a yearly rent issuing out of his land to another, &c., if the grantor thereafter pay to the grantee a penny "or a halfpenny, in name of seisin of the rent, then, if after the next day of payment the rent be denied, the grantee may have [*224 an assize, or else not," &c.: and Lord COKE, in his commentary on this passage, is equally decisive: "By this, &c., is implied, that the grant and delivery of the deed is no seisin of the rent; and that a seisin in law, which the grantee hath by the grant, is not sufficient to maintain an assize, or any other real action, but there must be an actual seisin." (a) And in Com. Dig. tit. *Seisin*, (C.) and (D.), the older authorities are brought together, establishing the distinction in this respect between a seisin in law and a seisin in fact, or, as it is called, an actual seisin. And this appears more distinctly in the commentary of Lord COKE on the eighth section of Littleton, which relates to the doctrine of *possessio fratris*, where Lord COKE says, (b) "What then is the law of a rent, advowson, or such things that lie in grant? If a rent or an advowson do descend to the elder son, and he dieth before he hath seisin of the rent, or present to the church, the rent or advowson shall descend to the youngest son, [that is by the other venter,] for that he must make himself

(a) See Co. Litt. 160, a.

(b) See Co. Litt. 15, b.

heir to his father." And, although Lord COKE there distinguishes the law as to the case of tenant by the curtesy, where, in favour of that estate, the husband shall have the rent, although his wife dies before the rent day, it makes no difference as to the present argument. The actual possession of rent being, therefore, a well-known legal phrase or expression, the legislature cannot be taken to have used it in any other than such well-known sense, that is, as contradistinguished from such possession in law, or right to the rent-charge, as the bare delivery of the deed of grant would confer. And, when it is said that the authorities only show that

*225] *such seisin in fact is necessary in order to maintain an assize, or make a *possessio fratris*, but that it by no means follows that it is necessary to confer a vote, the answer is, that it is a mere assumption on the part of the appellant that the expression is used in the statute in a limited and restricted sense; and, at all events, the burden of proving this is cast upon the appellant; the statute having applied the expression to the right of the claimant to be put upon the register. And, as it is quite clear, that, in the case of land, there must be more than the execution of the conveyance,—that there must be actual possession or receipt of the rents and profits,—there seems no reason why, in the case of an incorporeal hereditament, to which the provision of the statute equally applies, there should not be such further actual possession as the nature of the subject itself is capable of. And, accordingly, by various statutes before the statute 2 W. 4, the legislature has made a similar provision, in the very same terms, for the prevention of the occasional acquirements of freeholds for the purpose of voting. Such are the 18 G. 2, c. 18, s. 5, requiring such actual possession for twelve calendar months before the election. Again, the 3 G. 3, c. 24, which, after reciting that annuities and rent-charges are of a private nature, and therefore liable to fraudulent practices in elections, enacts that no person shall vote in respect of any annuity or rent-charge, unless a certificate upon oath shall be entered, twelve calendar months before the first day of the election, with the clerk of the peace of the county, and a memorial also of the grant registered with the clerk of the peace for the same period of time. And, as this statute is repealed by the statute of 6 & 7 Vict. c. 18, s. 72, and no other provision enacted in lieu of it, it may well be inferred, that, under the 2 W. 4, c. 45, s. 26, the legislature intended something more than the

*226] mere production of the deed, by requiring actual possession for *six calendar months. We therefore think the decision is right, and affirm the same.

Decision affirmed.

BOROUGH OF DARTMOUTH.

JOHN KNOWLES, Appellant; JOHN BROOKING, Respondent. *Feb. 23.*

A notice of objection, pursuant to the 6 & 7 Vict. c. 18, s. 17, (a) sched. (B.), Nos. 10, 11, signed by the objector, with the addition of his true place of abode, is sufficient, notwithstanding it differs from that erroneously placed against his name in the list of voters. Per Tindal, C. J., and Coltman and Erle, Js.; *dissentiente*, Maule, J.

JOHN BROOKING, on the list of persons entitled to vote in respect of property occupied within the parish of St. Saviour's, in the borough of Dartmouth, objected to the name of John Knowles being retained in the said list.

The notice of objection sent to the said John Knowles by the said John Brooking was as follows:—

“To Mr. John Knowles,

“I hereby give you notice that I object to your name being retained on the list of persons entitled to *vote in the election of a member for the borough of Clifton-Dartmouth-Hardness. [227

“Dated this 22d day of August, 1845.

(Signed)

“JOHN BROOKING,

“Of Higher street, Dartmouth, on the list of voters for the parish of St. Saviour's.”

A notice, similarly signed, was sent by the said John Brooking to the overseers of St. Saviour's.

The place of abode of the said John Brooking was stated in the said list to be New Road. The said John Brooking had offices in New Road, and a servant lived in the house to look after them; but the said John Brooking did not live there, either at the time of the publication of the list by the overseers, or at the time of the service of the notice. The said John Brooking's place of abode was truly described in the notices of objection, and his place of abode was stated in the list of voters for the parish of St. Petrox, another of the parishes comprised within the said borough, to be in Higher street. It was urged, on behalf of the said John Knowles, that John Brooking's place of abode in the notice of ob-

(a) Which enacts, “That every person whose name shall have been inserted in any list of voters for any city or borough, may object to any other person as not having been entitled on the last day of July next preceding, to have his name inserted in any list of voters for the same city or borough; and every person so objecting shall, on or before the 25th day of August in that year, give or cause to be given a notice, according to the form numbered 10, in the schedule (B.), or to the like effect, to the overseers who shall have made out the list in which the name of the person so objected to shall have been inserted; or, if the person objected to shall have been inserted in the list of freemen of any city or borough except the city of London, then to the town-clerk of such city or borough: and every person so objecting shall also give or cause to be left at the place of abode of the person objected to, as stated in the said list, a notice, according to the form numbered 11, in the said schedule (B.); and every notice of objection shall be signed by the person objecting.”

jection ought to have been the same as that stated in the list of St. Saviour's, to which list he referred in the notice. On behalf of the said John Brooking, it was contended, that, by giving his true place of abode, he had followed the forms Nos. 10 and 11, (schedule B.), referred to in the seventeenth section of the registration act, 6 & 7 Vict. c. 18, and that the notices were, therefore, sufficient.

The revising barrister decided that they were sufficient; and, the qualification of the said John Knowles not being proved, he erased the name of the said John Knowles from the said list. The question for the opinion of the court was, whether the said John Brooking's statement of the true place of his abode in the said notices was, under the circumstances here-
 *228] inbefore *stated, sufficient in law to sustain the said notices against the said John Knowles. If the court are of that opinion, the register is to stand without amendment. If the court are of a contrary opinion, then the register is to be amended by inserting the names of John Knowles and nine other persons.

The case was argued in Michaelmas term last.(a)

Kinglake, Serjt., for the appellant. The place of abode of the objector, stated in a notice of objection given pursuant to the 6 & 7 Vict. c. 18, s. 17, should correspond with that which appears affixed to his name in the list of voters. The notice must show upon the face of it that the party objecting is one who has a right to object. The place of abode is required for the express purpose of identification. [TINDAL, C. J. So that, if there is a mistake in the list, the party cannot rectify it in his notice?] He may rectify it, as far as he is concerned, by sending in a new claim. It is certainly much more convenient that the description should agree in this manner. In *Gadsby*, app., *Warburton*, resp., 7 M. & G. 11, 8 Scott, N. R. 775, the court seemed to have thought it sufficient if the notice in this respect followed the list, though the description in the list might not be quite so accurate as it should be. The judgment of MAULE, J., in that case, is quite decisive of the question. [MAULE, J. What I there meant to say, was, that the introduction of the word "of" refers it to the place of abode of the party, in exclusion of the place from which the notice is dated.] The only object of giving the place of abode is, the identification of the party. To vary it will only mislead.

*229] *Manning*, Serjt., for the respondent. It is enough if the objector gives his true place of abode, however mistakenly he may be described in the list of voters. [MAULE, J. Suppose his Christian name, or his surname, or both, were wrongly stated in the list, would a notice signed with his true name be enough?] In that case he would not be on the list at all. [MAULE, J. Suppose he changed his name: (b) would a notice signed with his new name be sufficient?] It might or

(a) Before Tindal, C. J., and Coltman, Maule, and Erle, Js.

(b) See *Barlow v. Bateman*, 3 P. Wms. 65; *Sir Francis Gaudie's case*, Co. Litt. 3, a; *Williams v. Bryant*, 5 M. & W. 447, 7 Dowl. P. C. 502.

might not, according to circumstances. Upon the words of the seventeenth section, as well as upon the form given in schedule (B.), Nos. 10 and 11, this notice is clearly sufficient. The objector has obeyed the statute, and he has literally observed the form: he was not bound to adopt the blunder of the overseers. A frivolous objector is liable to be visited with costs.(a) That provision might be rendered futile, if a false address may be adopted. [TINDAL, C. J., pointed out the distinction in the mode of stating the abode in Nos. 4 and 5 in schedule (A.)] Any one reading the notice would naturally infer from it that the objector resided at the place therein mentioned at the time of giving the notice.

Kinglake, Serjt., was heard in reply.

Cur. adv. vult.

There being a difference amongst the judges, they now delivered their opinions *seriatim*.

TINDAL, C. J. The question reserved for our determination by the revising barrister in this case, is, whether the notices of objection against the name of a *person being retained on the list of voters for a borough, which notices were signed by the objector, with the addition of his true place of abode, as it was at the time of giving the notice, but differing from the place of abode which was inserted against his name on the list of voters, are sufficient. The revising barrister held the notices to be sufficient; and, although the question may be subject to considerable doubt, and one of my learned brothers, for whose judgment I entertain the greatest respect, thinks differently, the opinion at which I have been compelled to arrive is, that the revising barrister's decision was right. [*230]

The forms of the two notices upon which the precise question turns, are those numbered 10 and 11 in the schedule (B.) in the registration act, (6 & 7 Vict. c. 18,) and it is upon the construction of those forms that the question must mainly turn. But it may receive some light from the consideration of the forms numbered 4 and 5 in schedule (A.) of the same act, and also from the same forms (since repealed) given in schedules H. and I. of the statute 2 W. 4, c. 45. The forms in question, numbered 10 and 11 in schedule (B.), each concludes thus: "Signed A. B. of [*place of abode*,] on the list of voters for the parish of ——" And the appellant contends that these latter words, "on the list of voters for the parish of ——" operate as a direction or requisition to the objector that he must fill up his place of abode by inserting the place of abode which is against his name in the list of voters. The respondent, on the other hand, contends that the words mean no more than a simple allegation that the objector's name is on the list of voters, as it was required that he should be by the seventeenth section of the 6 & 7 Vict. c. 18; for, it is to be observed that the seventeenth section requires only that the name of the objector shall have been inserted in the list of voters for the borough, and

(a) 6 & 7 Vict. c. 18, s. 46.

*231] that he shall give the notice of objection to the *overseers "according to the form numbered 10 in the schedule (B.), or to the like effect;" and that he shall also cause to be given, or left at *the place of abode of the person objected to, as stated in the said list*, "a notice according to the form numbered 11 in the said schedule;" so that the question substantially turns upon the construction of the forms so referred to, and given in the schedule.

And it appears to me, that, looking at the concluding words of those two forms, they do not in any manner qualify the sense of what preceded, namely, "place of abode," nor in any manner refer to the place of abode contained in the list of voters; but that the whole sentence is satisfied, if the true place of abode of the objector, at the time of giving the notice, is inserted therein. The words between the parentheses are only "place of abode;" words which, taken absolutely and by themselves, and in their natural sense, would denote the then place of abode of the party objecting; for, the words between the parentheses are not "place of abode on the list of voters," which would necessarily require the construction contended for by the appellant; nor are the words "as on the list of voters," which latter form would have also necessarily required the same construction: but the words within the parentheses are simply "place of abode," and the words that follow contain a separate and distinct proposition that such *name*, not such *place of abode*, is to be found on the list of voters. And it appears to me to confirm this construction of the form in the schedule, that, in the seventeenth section, which gives these two forms of notice, the notice which is to be given to the party is directed to be left at the place of abode of the person objected to, *as stated in the list*: whereas the form itself, when referring to the place of abode of the objector, says no more than "place of abode;" and, as the

*232] form itself *may be considered as if it were actually inserted in the body of the seventeenth section, this distinction in the language of the legislature, with respect to the place of abode of the person objecting, and that of the person objected to, still further sanctions the difference of interpretation to be put upon the two. And, further, upon referring to the forms of the corresponding notices, as given by schedule (A.) of the same act, in the case of objections to the names of voters being retained upon the register for the county, this view of the subject appears to be confirmed; for, schedule (A.), No. 4, which is the form of notice to be given to the overseers, contains two columns, the first headed, "Christian and surname of the voter objected to, as described in the list or register;" the second column, "Place of abode, as described." But the signature of the objector himself is only required to be "A. B. [*place of abode*,"] simply, and nothing more. In that form, therefore, the place of abode of the objector must, in its natural sense, be construed the place of abode of which he then is, and no other; more particularly when contrasted with the requisition as to the place of abode of the party objected to, which

is required to be stated as "described in the register." The form which immediately follows, schedule (A.), No. 5, which is to be given to the party objected to, leads to the same conclusion. The name and place of abode of the party objected to are required to be inserted "as described in the list:" the name of the objector is to be signed "A. B., of [*place of abode*,] on the register of voters for the parish of —." It is this form of notice (No. 5) to which the words are for the first time subjoined, "on the list of voters for the parish of —." In all the preceding forms of notice of objection, both that given to the overseers (No. 4,) and also in all the forms of notices of objection given under the former statute, 2 W. 4, c. 45, the *signature is directed to be, "A. B., [**233 of [place of abode,*" and nothing more. And, if the notices of objection under the statute of W. 4, whilst those forms remained in force, and the notice of objection to be given to the overseers under schedule (A.), No. 4, in the registration act, are all satisfied by adding the place of abode of the objector at the time, (no more than the simple place of abode being required by any words in those cases,) there is surely nothing in the reason of the thing which would call for the insertion of the very same place of abode of the objector as that in the list of voters, in the other remaining forms given by the statute; and certainly I cannot see such an insertion is made necessary by the enacting words of the statute, or by the forms given in the schedules. The words "on the list of voters" appear to me to be no more than a direct allegation of the existence of the fact which has been made essential by the seventeenth section, namely, that the objector's name is on the register for the county, or the list of voters for the borough, (as the case may be,) a fact, the truth of which may be determined by the overseers, by reference to the register or list, of which a copy is in their custody; or by the party objected to, by his inspecting such register or list, which he is empowered by law to do. And, although it is objected, that, if a new description is given for the first time of the objector's place of abode, it must give rise to difficulty or confusion, it seems a sufficient answer, that no real difficulty can follow, unless there happens to be more than one voter upon the same register or list having the same Christian name and surname; for, if there is but one, he must be the man who objects, and no other, however his place of abode is described; and, even if there are two or more, all the difficulty will be removed when the proper time arrives, namely, when the case comes *before the revising barrister; at which time the iden- [**234 tity of the objector must be made out; and, in the mean time, the giving the true place of abode of the objector must afford a better opportunity of inquiry and communication than the adding of the old place of abode, which, it must be assumed, from some cause or other, is incorrect at the time of giving the notice. Upon the ground, therefore, that the construction above given of the forms of notice appears to me the most natural and simple, and that it is confirmed by the heading of the*

forms as above adverted to, I have arrived at the conclusion that the decision of the revising barrister is right. I forbear to enter upon an examination of the relative convenience or inconvenience of either decision, not only because they appear to me to be nearly, if not quite balanced, but because I think, that, unless there is some preponderance in that respect, our determination ought to rest on the words of the statute itself.

COLTMAN, J. In this case the question has been fully stated by my Lord Chief Justice, and I concur with him in the opinion he has expressed on the subject, and in the reasons which he has assigned for it. I am not able to see any considerable advantage which the one construction contended for has over the other, and therefore I think the most plain and natural meaning is that which ought to be adopted; and it seems to me that the words "place of abode," at the bottom of the form No. 10 of schedule B. of the 6 & 7 Vict. c. 18, in their natural sense, mean his true place of abode, and must be so understood, unless there are some words of qualification added to them. The following words, "on the list of voters for the parish of —," do describe a quality of the objector himself, but not, as it seems to me, a quality of the place in which he lives.

*235] John Brooking, the objector, is truly said to be on the list of *voters for the parish of St. Saviour's; but it cannot be said, with any propriety of language, that Higher street, Dartmouth, is on the list of voters for the parish of St. Saviour's. If the intention of the act had been to require the objector to state, not his true place of abode, but the place of abode described in the list, it would have said so in plain terms, and the form would have been, "A. B. on the list of voters for the parish of —," with the parenthesis "*[place of abode as described on the list]*," or to that effect. And I am the rather led to the conclusion I have come to from the use of terms to that effect in the forms in schedule (A.), Nos. 4 and 5; the words used in No. 4 being, "the place of abode as described," and the words in No 5 being, "place of abode as described in the list." The reasons for the construction I have put on the form principally in question, have been already stated with so much distinctness by my lord, that it is unnecessary to add any thing further, except to say that I fully concur in those reasons.

MAULE, J.(a) This is an appeal from the decision of the revising barrister for the borough of Dartmouth, who held that the notices of objection which had been given to the overseers, and to the person objected to, were sufficient. These notices concluded with the words, "(Signed) John Brooking, of Higher street, Dartmouth, on the list of voters for the parish of St. Saviour's;" the place of abode of the objector, as mentioned in the list of voters referred to, being New Road, and not Higher street; and the fact being, that, although he had offices in New Road, his place of abode was Higher street. The notices were objected to, on the ground that they omitted the place of abode as mentioned in the list referred to. The act

(a) This judgment was read by Erle, J., Maule, J., being absent by reason of illness.

6 & 7 Vict. c. 18 requires, in sect. 13, *the overseers of every parish in a borough to make out lists of persons entitled to vote, according to forms numbered 3 and 4 in schedule (B.), and that the Christian name and surname of each person on the lists shall be written at full length, together with the place of his abode, and the nature of his qualification. The forms numbered 3 and 4 have columns for the Christian and surname at full length, and for the place of abode. Section 17 gives to any person whose name shall have been inserted in any list of voters for a borough, a power to object to any other person as not having been entitled to have his name inserted in any list, and provides that he shall give notices of objection according to the forms numbered 10 and 11 in schedule (B.). The forms Nos. 10 and 11 conclude thus: "Dated this — day of —, —. (Signed) A. B., of [*place of abode*,] on the list of voters for the parish of —." And the question is, whether this provision as to the notices has been complied with; in other words, whether a notice is sufficient which wholly omits all mention of the place of abode of the objector as it appears in the list of voters. For the appellant it was insisted, that this section of the act requires, that, at all events, the place of abode of the objector, as it appeared on the list of voters to which the notice refers, must appear on the notice, whether, in case of mistake in the list of voters, or change of abode since it was made out, it might or might not be necessary to add a mention of the place of abode at the date of the objection. For the respondent it was contended, that the place of abode required to be mentioned was that at the date of the objection, and that the act did not require any mention of the objector's abode as it appeared on the list of voters. As the question to be decided depends upon the construction of the seventeenth section of the 6 & 7 Vict. c. 18, and of a notice drawn in the form therein *prescribed, it may be convenient to consider the general nature and purpose of the act in which the section in question occurs. The act of 2 W. 4, c. 45, "To amend the representation of the people in England and Wales," contained, as incidental to the important changes which it made, certain provisions for the registering of persons entitled to vote for members of parliament. These provisions having been found insufficient, the act of 6 & 7 Vict. c. 18 was passed, of which the principal object was to make a new set of regulations for forming registers of voters. This act accordingly made many additions to, and alterations in, the provisions relating to registration, of the act of William; among which are to be noticed, first, that the act of William gives, in sect. 39, the power of objecting to a name being retained on a list of voters, in counties, not only to persons on the register, but to those who have claimed to be inserted in a list of voters, whether they have actually been inserted or not; while the act of Victoria by sect. 7, confines such power of objecting to persons whose names are on the register; secondly, that, in the forms given for lists of voters, of claimants, and of persons objected to, in cities and boroughs,

in the act of William, no mention of the place of abode is required, except in the case of freemen, and of rights of voting not depending upon property; while, in the case of county voters, the place of abode was always to be inserted: so that, in a borough register formed under that act, many voters would be described by their Christian and surnames only, without any addition of place of abode. This is altered by the act of Victoria, which requires, that, in all cases, without exception, both in counties and boroughs, the place of abode, as well as the name, shall appear on the list. A third alteration is in the form of notices of objection, which, under the act of William, did not contain any statement that the objector

*238] was on the register, or was *a claimant in a county, or was on a list of voters in a borough; and did not, in any other manner, show that he was one of the class of persons to whom the right of objecting belonged. The act of Victoria, in all cases, with one exception, (to be hereafter noticed,) requires the objector to describe himself as on the register or list of voters, and to refer particularly to the parish on the register or list. The object of these alterations probably was, to identify the persons mentioned in the list more completely, so as to enable those whom it concerned to know, easily and certainly, who the persons named were, and to enable the party objected to, by referring to the list or portion of the register mentioned in the notice, to ascertain whether the objector had shown himself to have a right to object; and, in case of its not appearing that the objector had such right, to enable him safely to disregard an objection which the revising barrister would be bound to treat as not sufficient to call upon him to prove his qualification. The alterations are not only well adapted to effect these purposes, but are also in conformity with the law, which, in many cases, has made it necessary, and with general convenience, which in most cases has made it usual, to identify a person by means of his Christian and surname, and of his place of abode; and they are also in conformity with the rule which, in case of a special authority or power to be exercised in writing, requires that the writing should show that the person assuming to exercise it is one of those to whom it belongs. The form of notice before referred to as an exception from the general rule, that, under the act of Victoria, all forms of notices of objection require the objector to describe himself as on the register or list, confirms the view, that the intention of these forms is, to enable the party objected to, to refer with ease to the list or register, to

*239] ascertain whether the objector is to be found upon it. *That exception is the form No. 4 in schedule (A.) of the act of Victoria, which form is not for a notice to the party objected to, but to the overseers in a county. This form concludes with the words "A. B. [*place of abode*,"] without any statement of the objector being on the register. Now, it is to be observed, that the overseers have, as such, no concern with the question, whether the objector is on the register or not. By sect. 8 of the act of Victoria, they are required to publish a list of all

persons against whom notice of objection has been given to them ; and, by sect. 34, to bring the original notices to the revising barrister, who, and not the overseers, is to judge of their sufficiency. The overseers have no interest or duty resting on them to ascertain whether the objector is on the register ; a reference to it could not assist and might embarrass them, as it might be considered as calling on them to refer to the register for the whole county. And this view is in conformity with sect. 3 of the act, which requires the clerk of the peace to send to the overseer a copy of such part only of the register as relates to his parish ; thus treating him as a person who can have no concern with the parts of the register relating to other parishes.

It was not denied, on the part of the respondent, that the notices in question ought to contain an assertion of the right to object ; but it was contended, that that right was sufficiently stated in the words “on the list of voters for the parish of ——— ;” and that the preceding words, “A. B. of [*place of abode*,”] were not intended as a statement of the name and addition of the objector as inserted in the list, but of his name and addition at the time of signing the notice. It is material, on this part of the discussion, to observe, that the immediate subject of inquiry is, what is the meaning of a notice filled up according to the form ; for, it is such *notice, and not the form itself, that is sent to the party [240 objected to. The want of adverting to this has, I think, produced some confusion. The form of notice has the words “place of abode” in italics, within parentheses, between the words “A. B. of” and the words “on the list of voters ;” but these parentheses are not to be retained in the notice when drawn, but are only meant to show that the words within them are not to be the very words in the notice, but are only a direction as to what those words shall be. This is manifest from the word “of” in the form not being within the parentheses ; so that a notice drawn according to the form, would, to take an example, for the sake of clearness, run thus : “John Smith, of Broad street, on the list of voters for the parish of St. Mary,” without any parentheses. And the question is, how a notice in these words should be understood. It is a mistake to treat it as if the parentheses were retained.

It is to be observed, that the right to object does not, since the act of Victoria, depend on the right to vote, or the right to be on a list ; for, a person may have a right to vote, or to be on a list, and yet have no right to object, if, in fact, his name is not inserted in a list ; or he may have no right to vote, or to be on a list, and yet may have a right to object, in respect of being in fact on a list. The right to object, therefore, being entirely dependent on some one entry in a list of voters, whether the name and place of abode be correctly stated in such entry or not, it seems to me that this construction of the forms is more conformable to the general rules of law, and to the intention of the act of Victoria, which requires the notices to point out, distinctly, which of all the entries

in the list is that which is relied on as the foundation of the right to object; thus, not merely claiming the right, or making a general assertion, from which it might be inferred, but (in conformity with the *241] *rule which prevails with respect to the exercise of powers or authorities by writing) showing, in particular, the fact on which the right depends, and enabling the voter to ascertain, by a simple inspection of the list referred to, whether the right to object which is relied on does really exist. A minute consideration of the terms of a notice drawn according to the form confirms this construction; the natural and obvious meaning of the words, "on the list of voters for the parish of St. Mary," following the words "John Smith, of Broad street," (to use the same example as before,) is, that "John Smith" and "Broad street" are mentioned in the list as the name and place of abode of a voter, and not that the objector is a person whose present name and place of abode are "John Smith of Broad street," but whose name and place of abode on the list may be the same or different. It can hardly be denied, that, in the absence of parentheses, the words, "on the register of voters for the parish of St. Mary," are left to operate, in like manner, on the whole clause which precedes them—"John Smith, of Broad street," or they operate on no part of it; for, it seems very difficult to contend that they operate differently on the words "John Smith," and on the intervening words of "Broad street," so as to mean that the name of the voter on the list was "John Smith," but not to mean that the place of abode on the list was "Broad street;" and, accordingly, it was argued for the respondent, that the words "on the list," &c., did not import that either the name "John Smith," or the place of abode, "Broad street," was mentioned on the list; and that is, certainly, a more reasonable construction than that which treats the words "on the list," &c., as operating on the words "John Smith," and as having no operation on the intervening words "of Broad street;" which construction seems to rest on a tacit but erroneous application of the parentheses, which are found in the form, *242] *to the words of the actual notice, in which it is not found. That the notice is to be understood, not merely as affirming that the objector is on the list of voters, and therefore has a right to object, but as referring to a particular entry, is further confirmed by the forms requiring the notices to specify the particular list on which the objector is to be found. If it were intended as a mere assertion of a right to object, it would be sufficient to state that the objector was on a list of voters for the borough, and, in the corresponding case in counties, that the objector was on the register, without saying, as is required by schedule (A.), No. 5, for what parish. As the particular list is referred to, it is natural that the particular entry itself should also be referred to, each reference being in furtherance of the same object.

It was contended for the respondent, that, by the construction contended for by the appellant, a voter who might wish to communicate with

the objector might be prevented doing so, in the case of an objector whose present place of abode was different from that on the list referred to, whether this difference arose from error or from change. But it is doubtful whether the act contemplated any such communication: it does not authorize or require it; it imposes no duty to make, nor confers any right on the maker of any such communication. But, if it did contemplate such communications, such communications must probably be very rare. The cases of error and change are a very small portion of the whole number of cases; and such errors or changes as would prevent the objector being reached by a letter directed to him, at his abode, as mentioned in the list, must be a very small portion of the whole number of cases of error and change; and it may be observed that, in the case now in judgment, no such inconvenience did arise. The legislature, in the much more important case of the service of a notice of *objection [243—the giving of which is essential to the objector's right, and the receipt of it to the voter's defence—has considered that it is sufficient to send the notice to the abode mentioned in the list. Indeed, the general scope of the act of Victoria seems to be, that, for all purposes connected with registration, the description on the list, both by name and place of abode, shall be taken to be the true description; and the effect of this provision would probably be, that every voter who took an interest in elections would take care that notices, &c., directed to him at his abode on the list should be forwarded to him. But, even supposing that it were the object of the act to enable the party objected to, to communicate with the objector, the distinct statement of the right on which the objector relied is a much more important and principal one. If the first mentioned of these purposes be one which the notice was intended to effect, it may be, that, in cases of error and change of abode, the notice should specify the accurate or present description of the voter and his abode, as well as that on the list of voters; but it does not follow that he may omit all mention of his abode as stated in the list.

An argument was drawn from the form No. 5 in schedule (A.), where, in the beginning of the notice, the form was: "To Mr. — of — [*here insert the name and place of abode of the person objected to, as described in the list:*"] and at the end the form is—" (Signed) A. B. of [*place of abode,*] on the register of voters for the parish of —;" in the same words as in the forms in question, only putting "register" for "list of voters." Here, it is said, the insertion of the words, "as described in the list," in the first part of the notice, and the omission of the words, "on the register," in connection with the words, "place of abode," within the parentheses, in the last part, show that the place of abode in the last part is not to be that on the register. But the insertion and omission of these words may be otherwise *accounted for. In the [244 first part the place of abode is mentioned in the address of the notice, "To Mr. — of —;" and there are no such words as "on

the register of voters for the parish of ——,” which occur in the last part of the notice, and which, as I have before shown, refer to the place of abode as that mentioned in the register. In this last part it would be superfluous to put within the parentheses, “as described on the register,” because “on the register of voters for the parish of ——” expresses the same thing.

With regard to the comparative convenience in practice of the two constructions, there seems no doubt that that of the appellant is to be preferred. It enables the party objected to, and the revising barrister, easily to ascertain by inspection of the notice and list, without any extrinsic evidence, whether the notice is sufficient, inasmuch as, on this construction, where the place of abode in the notice is the same as on the register, no question of law or fact can be made as to its validity; whereas, if the respondent's construction is to prevail, many questions of law may probably arise as to what is a sufficient description in the notice of the place of abode—whether the county, parish, or post town is to be mentioned; and these will be the more numerous and doubtful, from the uncertainty of what the object was for which the insertion of the present place of abode was required by the act; and in all cases it must be a matter of evidence, and may be one of controversy, before the revising barrister, whether the place of abode be in fact truly stated in the notice. It was also suggested that the identification of the voter by his place of abode on the list would be unnecessary in a notice of objection, except in the case of two voters of the same name being on the list: but this is no answer to the argument arising from the convenience of the rule requiring identification by Christian name, surname, and place of abode; *245] all three may be necessary in some *cases, and they are required in all, for the sake of uniformity, simplicity, and convenience.

I think, for these reasons, that a due consideration of the principles of law which are applicable to the case, of the general intent of the registration act, and of the true meaning of those particular provisions which relate to notices, leads to the conclusion that the appellant's construction of the notices is the true one, and that it avoids great practical inconvenience which would arise from adopting that of the respondent; and, consequently, that the decision of the revising barrister ought to be reversed.

ERLE, J. I concur in the judgment and the reasons assigned by the Lord Chief Justice. The appellant's contention that the words “on the list of voters,” &c., apply to the place of abode, and that the form in question is to be construed to mean “A. B., described on the list of voters, &c., to be of the place of abode,” appears to me to be open to several objections. First, that the words must be altered before they express this meaning, whereas they are capable of a sensible application without any alteration. Secondly, when so altered, they contain an immaterial statement, whereas, if applied to the person, they are material

to show his qualification. Thirdly, it gives different meanings to the same words in two acts *in pari materia*—making them denote the true place of abode in the first, and the described place of abode in the last. Fourthly, if the described place of abode had been intended, those words would have been used, for they are used on several occasions in both statutes, where the writer of a notice is referred to the list for the place of abode of another person whom he may not know otherwise than from the list; but the words in question in other instances denote the true place of abode of the writer, which he is presumed by the legislature to be able to give *without difficulty. I cannot discover any good effect from requiring the place of abode as described in the list, [*246 instead of the true place. If communication is contemplated, the true place is best. If the name occurs only once, the identity is clear, without referring to place. If the name occurs twice, the objector is identified at the revision, which is as early as can be useful, if no communication is intended. If pretended objectors are to be guarded against, there would be no security from requiring the place to be transcribed.

Decision affirmed.

EASTER TERM.

BOROUGH OF NEW SARUM.

JAMES HENRY WILLS, Appellant, CHARLES ADEY, Respondent. *April 22.*

C. A., on the list of voters for the parish of Fisherton Anger, was described in the list as residing in "Fisherton street;" in a notice of objection he described himself as "C. A., of the parish of Fisherton Anger, on the list of voters for the said parish of Fisherton Anger:" there was no other person of that name upon the list of voters for Fisherton Anger:—*Held*, that the notice was sufficient.

THE parliamentary borough of New Sarum comprises the following parishes or places, viz., the liberty of the Close, the several parishes of St. Thomas, St. Edmund, and St. Martin, part of the parish of Fisherton Anger, and part of the parish of Milford.

Charles Adey duly objected to the name of James Henry Wills being retained on the list of voters for the said borough.

The appellant's name appeared on the list of voters for the parish of St. Edmund in the said borough, in respect of a house in Castle street in the said parish; *and the respondent had served the appellant with a notice of objection, of which the following is a copy:— [*247

"To Mr. James Henry Wills, of Castle street, in the parish of St. Edmund, in the borough of New Sarum, in the county of Wilts.

"I hereby give you notice that I object to your name being retained in

the list of persons entitled to vote in the election of members for the borough of New Sarum, in the county of Wilts. Dated, &c.

(Signed)

“CHARLES ADEY,

“of the parish of Fisherton Anger, in the said borough; on the list of voters for the parish of Fisherton Anger.”

The respondent's name appeared on the list of persons entitled to vote in the election of members for the said borough, in respect of property occupied within the parish of Fisherton Anger, as follows:—

Christian Name and Surname of each voter.	Place of Abode.	Nature of Qualification.	Street, lane, or other like place in this parish, where the property is situate.
Charles Adey.	Fisherton street.	House and garden.	Fisherton street.

It appeared that the parish of Fisherton Anger contained the several streets or places known by the following names:—Fisherton street—Wilton Road—Devizes Road—Church street—Bowling-Green Lane—Back Lane. There was no other person of the name of Charles Adey upon the list of voters for Fisherton Anger.

It was objected, on behalf of the appellant, that the description of the respondent's place of abode, as it appeared on the notice of objection, was not sufficient to sustain a notice of objection against a voter on the list, for the purpose of expunging his name from the register; for, that he should have described his place of abode to be “Fisherton street,” as described in the list, and not of the parish of “Fisherton Anger” alone.

*248] *The revising barrister, however, held the notice to be sufficient; and the name of the appellant was erased from the list, upon his not appearing to support his qualification.

The question for the opinion of the court is, whether the respondent's statement in the notice of objection, of his place of abode, is, under the circumstances mentioned, sufficient in law to sustain the said notice against the appellant. If the court shall be of opinion that the description given by the respondent in the said notice of objection, of his place of abode, is *not* sufficient in law to sustain the notice of objection against the appellant, the name of the appellant is to be inserted on the list of voters for the said borough.

The validity of the notices of objection to twelve other persons whose names were expunged from the same list, depended upon the same point; their cases were consolidated with the principal case.

The case was argued in Hilary term last, (a) by *Kinglake*, Serjt., for the appellant, and *Arnold* for the respondent. *Cur. adv. vult.*

TINDAL, C. J., now said that the majority of the court were of opinion that there was no distinction between this case and that of *Knowles*, app., *Brooking*, resp., antè, p. 226, and that consequently the decision of the revising barrister must be affirmed. His lordship added that MAULE, J., wished him to say that he still adhered to the opinion he gave in that case.

Decision affirmed.

END OF REGISTRATION CASES.

CASES
 ARGUED AND DETERMINED
 IN THE
COURT OF COMMON PLEAS,
 AND
 UPON WRITS OF ERROR FROM THAT COURT
 TO THE
 EXCHEQUER CHAMBER,
 IN
Michaelmas Term,
 IN THE NINTH YEAR OF THE REIGN OF VICTORIA.

The judges who usually sat in banco in this term, were,

TINDAL, C. J.
 COLTMAN, J.

MAULE, J.
 ERLE, J.

ILDERTON v. SILL. Nov. 5.

Quere, whether a judgment in debt by default, signed without notice of taxation, is irregular. But a judgment so signed was set aside without costs, upon an affidavit of merits.

THE plaintiff declared, in debt, against the defendant as the acceptor of a bill of exchange for 100*l.*, payable to the plaintiff or his order, and also for money lent by him to the defendant, for money had and received by the defendant to the use of the plaintiff, and for money found due from the defendant to the plaintiff upon an account stated.

The defendant in due time pleaded, to the first count, that the bill was accepted for the accommodation of the plaintiff, and without value or consideration; and, to the other counts, never indebted.

* The pleas not being signed by a serjeant, the plaintiff signed judgment, taxed his costs, and caused the defendant to be arrested upon a *ca. sa.*, under which he was detained in custody until he deposited with the plaintiff's attorney a check for the amount of debt and costs. [*250]

Upon an affidavit setting forth the above facts, and also stating that no notice of taxation had been given,

Shee, Serjt., in Trinity term last, obtained a rule nisi to set aside all the proceedings for irregularity. The defendant swore to merits, and that the plea pleaded to the first count was true in substance and in fact. Improper conduct was also imputed to the plaintiff's attorney in the service of the writ. The learned Serjeant referred to *Perry v. Turner*, 2 C. & J. 89, 2 Tyrwh. 128, 1 Dowl. P. C. 300, Price, P. C. 161; and *Lloyd v. Kent*, 5 Dowl. P. C. 125.

Channell, Serjt., now showed cause. The pleas not having the signature of a serjeant, the judgment was perfectly regular; and the cases of *Perry v. Turner* and *Lloyd v. Kent* are distinct authorities to show that the omission of a notice of taxation is not such an irregularity as will induce the court to set aside the judgment and subsequent proceedings, except upon the terms of payment of costs by the defendant, and the judgment standing as a security.

Shee, Serjt., in support of the rule. The interlocutory judgment (a) was no doubt regularly signed: but a judgment is only complete on the taxation of costs; of which, by the rule of court, the defendant is entitled to one *day's notice. (b) *Perry v. Turner*, if any thing, is an au- [*251
thority in favour of the defendant. BAYLEY, B., in delivering the judgment, there says: "I have cautiously avoided the doubt raised, whether neglect to give due notice of taxation would entitle the defendant's attorney to consider signing judgment irregular. The court certainly has ordered that a certain notice of taxation shall be given; but, what is to be the consequence (c) as between the parties, is not distinctly stated. Very probably they would set aside a judgment for irregularity, but certainly they would exercise a discretion, upon such an application, under the circumstances of each particular case." *Butler v. Bulkeley*, 1 Bingh. 233, 8 J. B. Moore, 104; and *Godson v. Lloyd*, 1 Gale, 244, are authorities to show that a judgment is not complete and final until the costs have been taxed, and their amount inserted in the allocatur. (d)

TINDAL, C. J. It appears to me that in this case both parties have been in the wrong. In the first place, the defendant was guilty of a default in delivering pleas not having the signature of a serjeant. The plaintiff afterwards took a very wrong and improper course in proceeding to tax the costs without notice, and arresting the defendant, and thereby putting him to additional and grievous expense and inconvenience.

(a) The judgment being in *debt*, it was not what is usually called an *interlocutory* judgment, but it would substantially be so, if a further step were necessary to make the judgment complete.

(b) Reg. Gen. Trinity term, 1 W. 4, r. 12, which provides, "that, before taxation of costs, one day's notice shall be given to the opposite party." And see Reg. Gen. Hilary term, 4 W. 4, r. 17, which directs that "notice of taxing costs shall not be necessary in any case where the defendant has not appeared in person, or by his attorney or guardian, notwithstanding the general rule of Trinity term, 1 W. 4, r. 12."

(c) Q. d. "Of an omission to give such notice."

(d) See *Salter v. Slade*, 3 N. & M. 717, 724; S. C., not S. P., 1 Ad. & E. 608; *Colbron v. Hall*, 5 Dowl. P. C. 534; *Walter v. De Richmond*, 6 Q. B. 544.

*252] Without deciding whether or not the judgment and *execution are irregular on account of the absence of such notice, I think we shall be exercising a proper discretion in making this rule absolute, without costs.

COLTMAN, J. Upon the cases, I should think the taxation of costs without notice, an irregularity. But it is not necessary to decide that question on the present occasion. I quite agree in the course suggested by the Lord Chief Justice.

ERLE, J., concurred.(a)

Rule absolute, without costs,—the defendant to plead within a week.

Channell, Serjt., submitted that the defendant should be confined to the pleas which had been delivered, and that he should undertake to bring no action.

Shee, Serjt., insisted that, under the circumstances, the defendant ought not to be put to any such terms.

TINDAL, C. J. I think the defendant should deliver the same pleas. Of course, no action must be brought: the exemption from costs may be treated as a set-off against the imaginary damages.

ERLE, J. The court dealing with the whole case as matter of equitable discretion, it would be manifestly unjust to allow the defendant to bring an action.

As to the pleas, if the defendant wishes for an additional plea, or for the amendment of a plea, he may apply to a judge at chambers.

Rule accordingly.

(a) Maule, J., was absent.

*253] *WIMSHURST v. DEELEY and Others. Nov. 5.

B. engaged to supply an engine and boilers for a steam vessel of A., "in conformity to the drawings and specification furnished by C.; the engine to be got up under the superintendence of C., and, when approved by him at the works, to be delivered by B. into the East India Docks, when B.'s liability ceases."

One of the terms contained in the specification was, that the engine, &c., should be completed within two months:—

Held, that time was of the essence of the contract, and that B. was liable to an action at the suit of A. for not delivering the engine and boilers within the two months.

ASSUMPSIT. The declaration stated, that, on the 16th of July, 1844, it was agreed between the plaintiff and defendants, that the defendants should supply the plaintiff, at the price of 850*l.*, with a certain steam-engine and boilers, including friction-couplings, for a certain vessel called *The Novelty*, according to certain drawings and specification in that behalf, furnished by one Peter Borrie, and on the terms and conditions, (amongst others,) that the defendants should finish the said engine and boilers, in a substantial and workmanlike manner, to the entire satisfac-

tion of Borrie, and agreeably to the tenor of the said specification and drawings, notwithstanding that every item might not be mentioned therein; that the defendants should deliver the said engine and boilers on board the said vessel, in the East India Docks, London, *within two months from the time of the making of the said agreement*; that one-half of the payment for the said engine and boilers should be made by the plaintiff to the defendants in cash after the said engine and boilers should be delivered on board the said vessel, and the other half by an approved bill at four months, after the said engine and boilers should be fitted on board; that the engine should be got up under the superintendence of Borrie, and, *when approved by him*, should be delivered by the defendants into the East India Docks, when the responsibility of the defendants should cease; that the defendants should provide three men for a fortnight, for the *purpose of fixing the engine and boilers, and, should this time [*254 be exceeded, the same should be paid for; that, should the boilers exceed the weight calculated by Borrie, the extra weight should be paid for at the rate stated in the quantities; and that if, for the purpose of accelerating the completion of the engine, it should be found necessary for the men to work over-time, the usual charge, of one quarter time, should be allowed and paid for: Mutual promises: Averment, that, although the said period of two months, so appointed as aforesaid for the delivery of the said engine and boilers according to the terms of the agreement, had elapsed long before the commencement of the suit; and although Borrie was ready to superintend, and did superintend, the getting up of the said engine, at all reasonable and proper times in that behalf from the time of the making of the said agreement until and at and after the time so appointed for the delivery of the said engine and boilers as aforesaid, and was ready to give his approval of the same when finished to his satisfaction, according to the terms of the said agreement; and although the said vessel was in the said East India Docks, London, ready to receive the said engine and boilers on board, according to the terms of the said agreement, from the time of the making of the said agreement until and at and after the time so appointed for the delivery of the said engine and boilers as aforesaid; and although the plaintiff was, during all the time last aforesaid, ready and willing to receive the said engine and boilers on board the said vessel, and to pay for the same according to the terms of the said agreement, and had always theretofore performed and fulfilled all things in the said agreement on his part to be performed and fulfilled—of all which premises the defendants then had notice: yet the defendants did not deliver the engine and boilers into the East India Docks, London, or on board of the said vessel, [*255 *so being in the said docks as aforesaid, within the period so appointed in that behalf as aforesaid, according to the terms of the said agreement, but therein wholly failed and made default, and the said engine and boilers were not in fact delivered by the defendants on board

the said vessel until after the expiration of a long time, to wit, six months, from the determination of the period so appointed for the delivery of the said engine and boilers according to the terms of the said agreement as aforesaid; whereby, and by reason of the said engine and boilers not being delivered on board of the said vessel according to the terms of the said agreement, the plaintiff had been prevented, during all the period last aforesaid, from making use of the said vessel, as he otherwise might and would have done, and had thereby lost and been deprived of divers great gains, profits, and advantages to the amount of 3000*l.*, which he otherwise might and would have made from the use of the said vessel, if the said engine and boilers had been delivered by the defendants according to the terms of the said agreement; and the plaintiff also, by reason of the premises, had been put to, and had necessarily incurred, divers charges and expenses, to the amount of 200*l.*, in and about getting the said vessel fitted with the said engine and boilers, and ready for use, and also divers other charges and expenses, to the amount of 300*l.*, in and about insuring, keeping, and taking care of the said vessel during all the period last aforesaid, and of which last-mentioned charges and expenses he the plaintiff had, by reason of the premises, wholly lost the benefit and advantages, &c.

The defendants pleaded *non assumpsit*, and four other pleas.

The cause was tried before ERLE, J., at the sittings in London after last Trinity term. It appeared that, in July, 1844, the defendants had
 *256] been applied to by the *plaintiff to make for him an engine and boilers for his vessel called *The Novelty*, the engine to be constructed upon a new principle patented by Borrie, and to be made according to certain drawings and to a specification produced by Borrie. The specification contained a condition that the engine, boilers, &c., should be completed and delivered *within two months*.

On the 15th of July, the defendants addressed and sent the following letter to the plaintiff:—

“Sir,—We shall be willing to supply an engine and boilers, including friction-couplings, *in conformity to the drawings and specification* furnished by Mr. Peter Borrie, for the sum of 850*l.* This engine is to be got up under the superintendence of Mr. Peter Borrie, and, *when approved by him at the works*, to be delivered by us into the East India Docks, when our responsibility ceases. We also agree to provide three men for a fortnight, for the purpose of fixing the engine and boilers; and, should this time be exceeded, the same to be paid for. Should the boilers exceed the weight calculated by Borrie, the extra weight to be paid for at the rate stated in the quantities. If, for the purpose of accelerating the completion of this engine, it be found necessary for the men to work overtime, the usual charge, of one quarter time, to be allowed and paid for.

(Signed) “For The Horseley Iron Company,
 “JOHN DEELEY.”

To this letter the plaintiff on the following day replied:—

“Gentlemen,—I beg to acknowledge the receipt of your letter of this day; and I also beg to accept your offer for making a new revolving engine and boilers, as stipulated in that letter.

(Signed)

“H. WIMSHURST.”

*On the part of the defendants, it was insisted that their letter of the 15th of July excluded that part of the specification which related to the time of performance of the contract, if not expressly, at least by necessary implication, inasmuch as the delivery of the engine and boilers was made dependent upon the approval of Borrie, the patentee; and that the contract was, according to its legal effect, a contract to furnish the engine and boilers within a reasonable time. [*257]

A verdict having been found for the plaintiff, subject to a reference to ascertain the amount of damages, and subject to a motion to enter a nonsuit or a verdict for the defendants on the first issue,

Channell, Serjt., now moved accordingly. He submitted that the defendants' letter of the 15th of July was a partial acceptance only of the contract described in the specification, excluding time; and that this modification of the contract was expressly assented to by the plaintiff's reply of the 16th.

TINDAL, C. J. The fair interpretation of the contract—the offer on the one side, and the acceptance on the other—appears to me to be, that the engine and boilers should be completed and delivered within two months. Time might be a most important consideration on the plaintiff's part. Without the machinery, the vessel would be useless: and the plaintiff may have entered into engagements from which he could not recede. The specification containing a stipulation that the engine, &c., should be completed and delivered within two months, when the defendants, in their letter of the 15th of July, say, “We shall be willing to supply an engine and boilers, including friction-couplings, in conformity to the drawings and specification,” I think they adopt the whole of the specification to which they do not specifically except. I, therefore, think there is no ground for the present motion. [*258]

The rest of the court concurred.

Rule refused.

CAMPBELL v. WEBSTER. Nov. 7.

Held, that any acknowledgment by the drawer of a bill, of his liability to pay, or any promise to pay the amount, though conditional as to the mode of payment, is evidence to be left to the jury, of due notice of dishonour, and, in the case of a foreign bill, of its having been duly protested.

ASSUMPSIT, on a bill of exchange for 100*l.*, drawn, on the 1st of June, 1844, by the defendant, at Halifax, in Nova Scotia, upon Capron & Co., London, payable at thirty days' sight to the plaintiff or his order. The

declaration alleged a presentment to Capron & Co. for acceptance, a refusal by them, and a protest for non-acceptance, and also a presentment for payment at the end of the thirty days, and a protest for non-payment; and that of all this the defendant had notice. There were also the common money counts.

The defendant pleaded to the first count, that the bill was not duly protested for non-acceptance, and that he had no notice of the protest for non-acceptance, and, to the subsequent counts, he pleaded *non assumpsit*.

The cause was tried before ERLE, J., at the second sitting at Westminster in Trinity term last. In support of the affirmative of the issue upon the protest for non-acceptance, a notary was called, who proved that he received the bill from Ransom & Co.,—the bankers in whose hands the bill had been placed for presentment,—that he presented it, and afterwards noted and protested it for non-acceptance. The protest was not produced: and, upon the objection being taken, and allowed by the learned judge, a paper was put in, purporting to be a protest, drawn up since the commencement of the action. *This the learned judge rejected.

*259] The following letters from the defendant to the plaintiff were then put in and relied on, either as a waiver of a protest, or as evidence that a protest had been duly made. The first letter was not dated, but it bore a post-mark date of the 3d of July, 1844.

"Sir,—I have accepted the bill for 200*l.*, and also the one for 180*l.* There was another bill for 100*l.* presented, about which there was some history attached, respecting its having been presented in place of another which has been cancelled. I do not recollect any thing about that bill; and, as I have not yet received the account you were to have sent me, I have no means of ascertaining any thing about it. I have deferred paying that bill until such time as I should hear from you about it. If it should be all right, draw on me again for the amount, and I will pay it as soon as I know something of it. I do not intend to return to Halifax, as I spend too much money there. (Signed) ARTHUR WEBSTER."

"August 30th, 1844.

"Sir,—I have at length received your letter, with the account of the money transactions between us. I find it all correct, with the exception that you have not credited me with a bill for 50*l.* sterling I drew on the 17th of October, 1842. I consequently have not given instructions to my agent to pay the bill for 100*l.* till that matter is set right.

(Signed) "ARTHUR WEBSTER."

"Durham, October 12th, 1844.

"Sir,—I cannot conceive how you can say in your last letter that you had explained to me about the 50*l.* bill, and that I was quite satisfied about it. I remember that there was an impression on your mind that I had had that money from you to buy a horse, or something: but the impression is equally strong on my mind that I *never had; and, what's more, I am confident I never had. What could I hav

*260]

wanted it for? I never bought a horse from an artillery officer in my life; and the first horse I bought in Halifax, was on the 19th of November. I then, as you know, did not pay Mayce for it for a year. As I said to you before, if you will send home a check for 50*l.* sterling to England, I will cause the 100*l.* bill to be paid immediately, and we shall then be square. (Signed) "ARTHUR WEBSTER."

On the part of the defendant, it was insisted that these letters were not evidence of actual protest, nor did they dispense with proof of actual protest, inasmuch as they contained mere conditional promises to pay the bill; and that, if intended to be relied on as evidence of a waiver of protest, such waiver should have been alleged in the declaration.

The learned judge told the jury that the letters were evidence whence they were at liberty to infer that the bill had been duly protested, and that the defendant had due notice of such protest. The jury thereupon returned a verdict for the plaintiff for the amount of the bill and interest.

Dowling, Serjt., in Trinity term, obtained a rule nisi for a new trial, on the ground of misdirection. He cited *Burgh v. Legge*, 5 M. & W. 418.

Byles, Serjt., (with whom was *Phinn*,) now showed cause. The ruling of the learned judge was correct. Presentment for payment, protest, and notice of protest or of dishonour, may all be proved by admission: and the letters produced at the trial contain a sufficient admission of the defendant's liability on the bill, to be left to the jury as evidence, not *conclusive*, certainly, but as *evidence from which they might infer [*261 that the bill had been protested, and that the defendant had had due notice thereof. An absolute unconditional promise to pay is not necessary. In *Croxon v. Worthen*, 5 M. & W. 5, it was expressly held that a promise to pay is evidence to be left to the jury upon an issue on presentment. ALDERSON, B., says: "The defendant is supposed to know the law; he knows, therefore, that he is not liable unless the note has been duly presented: with that knowledge he undertakes to pay it.(a) Is not that evidence for the jury that he knows it has been presented?" Several other cases might be cited to the same effect. The like rule holds with respect to protest. Thus, in *Patterson v. Becher*, 6 J. B. Moore, 319, it was held that a promise by the defendant to pay the bill, coupled with a letter from his attorney offering terms, dispensed with other proof of protest. DALLAS, C. J., is there made to say: "In *Lundie v. Robertson*, 7 East, 231, it was held that a subsequent promise by an endorser is a waiver of the objection of want of notice; and in *Jones v. Morgan*, 2 Campb. 474, where that case was recognised, it was decided that a promise to pay, after a bill is due, is a sufficient admission of the acceptance, as well as of the handwriting of the drawer, and of the

(a) It would be inconvenient if ignorance of the law relieved a party from civil or from criminal responsibility. It does not follow, that, in ascertaining the true meaning of an expression, the court is to allow itself to be misled by giving effect to a fiction.

other parties to the bill." A reference to the case of *Lundie v. Robertson* will show the sense in which his lordship uses the term "waiver." RICHARDSON, J., however, puts it on the right ground. "Even if the instrument in question," he says, "had been properly declared on as a foreign bill, it has been decided, in the case of *Rogers v. Stevens*, 2 T. R. 713, that a promise to pay after a bill or note becomes due, will dispense with proof *of presentment and notice of dishonour. So, *262] it will dispense with the proof of protest, as it will amount to an admission on the part of the defendant that the plaintiff had a right to resort to him upon the bill." In *Gibbon v. Coggan*, 2 Campb. 188, a promise of payment by the defendant after the bill was due, was held sufficient evidence of a protest for non-payment and notice of dishonour: and Lord ELLENBOROUGH said: "By a promise of the drawer to pay, he admits his liability; he admits the existence of every thing which is necessary to render him liable. When called upon for payment of the bill, he ought to have objected that there was no protest; instead of that, he promises to pay it. I must, therefore, presume that he had due notice, and that a protest was regularly drawn up by a notary." And the same learned judge in *Greenway v. Hindley*, 4 Campb. 52, ruled that a promise to pay a foreign bill, made after it was due, was evidence to support an allegation in the declaration of a due presentment for payment, a protest, and a regular notice of dishonour. It is every day's practice to treat a promise to pay as evidence of notice of dishonour. Then, can it be said that an express admission is less available for this purpose than an express promise? And, do the letters in this case contain a sufficient admission? In *Booth v. Jacobs*, 3 N. & M. 351, a letter written by the drawer to the holder of a bill, six days after the day on which the drawer should have received notice of dishonour, and containing ambiguous expressions respecting the non-payment of the bill, was held to be properly left to the jury as evidence from which they might or might not infer that notice had been given on the proper day. Subsequent cases have gone further even than that. Thus, in *Wilkins v. Jadis*, 1 M. & Rob. 41, proof *263] that the drawer of a bill knew, two days after its maturity, *that it was unpaid, and in the hands of a particular endorsee, and objected to pay it on the ground of fraud in the obtaining of it, was ruled by Lord TENTERDEN to be evidence to go to a jury that he had received regular notice of dishonour; (a) and, though a rule for a new trial was moved for on another ground, the propriety of that ruling was not questioned. In *Curlewis v. Corfield*, 1 Q. B. 814, 1 Gale & Dav. 489, in an action by a second endorsee against the drawer of a bill, the issue being whether the defendant had had notice of dishonour, evidence was given for the plaintiff, that, on the day after the dishonour, he wrote and sent a

(a) *Quere*, whether, if the party sued as drawer pleaded that he did not draw, and also that he had no notice of dishonour, an assertion by him that his name was forged would be evidence of notice of dishonour.

letter to the defendant, (an attorney,) which was put into the letter-box at the defendant's office, the office being closed ; that notice had been served on the defendant to produce a letter dated and sent to him on the above day, containing notice of the bill being dishonoured, which letter the defendant did not produce at the trial ; and that, after the letter supposed to contain the notice of dishonour was delivered, the defendant told the plaintiff's attorney (in answer to a threat of legal proceedings) that the bill had not been presented in time, not saying any thing as to notice of dishonour : and this was held to be evidence to go to the jury, of a regular notice of dishonour. So, in *Horford v. Wilson*, 1 Taunt. 12, part payment, and, in *Dixon v. Elliott*, 5 C. & P. 437, an offer of a composition, were held sufficient to warrant the jury in presuming a notice of dishonour to have been regularly given. And in *Brownell v. Bonney*, 1 Q. B. 39, 4 P. & D. 523, in assumpsit against the drawer and endorser of a bill of exchange, the issue being whether or not the defendant had received notice of dishonour, a declaration by him to a party (not the holder) that he should pay the bill, *and should not avail himself of the informality of notice*, was held to be evidence from which a jury might infer that the defendant had due notice. (a) These authorities show that an express promise to pay the bill, or an express admission of liability, is good evidence whence the jury may infer a presentment for payment, a protest, and notice of protest, or notice of dishonour ; and that even equivocal expressions may suffice for the purpose. Here, the letters contain ample materials to justify the inference that the bill in question was regularly protested, and that the defendant had due notice of the fact—amounting as they do to a distinct admission by the defendant that he owes the plaintiff 100*l.* on this bill. *Burgh v. Legge*, cited on the motion, was strictly a case of *dispensation*, and therefore has no application. [*264]

Dowling, Serjt., (with whom was *Channell*, Serjt.,) in support of the rule. The learned judge was clearly wrong in telling the jury that they might infer, from the letters produced, a regular protest, and notice thereof to the defendant. Those letters contain no admission of the defendant's liability at all, but a mere conditional promise to pay the bill when satisfied as to certain particulars ; and there was no evidence to show that that condition had been complied with by the plaintiff. At the most, the letters can only amount to a waiver of strict legal proof of presentment, protest and notice ; and, according to the authority of *Burgh v. Legge*, *do not support an allegation of *actual* protest and notice. [*265]

TINDAL, C. J. It appears to me that this rule ought to be discharged.

(a) *Quare*, whether, if the declaration had been, " notice was not given till Tuesday, but as I have not been damnedified by the omission, I will pay the amount," it would have been, not a mere waiver of the objection arising out of the want of notice on Monday, but evidence entitling a jury to find upon their oath, that notice had been actually given on that day.

The action is brought by the payee of a foreign bill of exchange, against the drawer. The pleas that raise the point which has been argued before us, are—first, that the defendant had no notice of protest; secondly, that the bill was not duly protested for non-acceptance. And the question is, whether the evidence given at the trial on the part of the plaintiff was properly received, the jury correctly directed upon it, and the conclusion they came to right. The rule seems to me to be properly laid down in the case of *Patterson v. Becher*, 6 J. B. Moore, 319, which goes to the very foundation of the objection here. The way in which RICHARDSON, J., there states the law upon the subject, appears to me to be perfectly correct. "It has been decided," he says, "in *Rogers v. Stevens*, that a promise to pay, after a bill or note becomes due, will dispense with proof of notice of dishonour. So, it will dispense with the proof of protest; as it will amount to an admission, on the part of the defendant, that the plaintiff had a right to resort to him upon the bill."^(a) That is, if, when payment is demanded, the party omits to avail himself of the preliminary objection of want of protest, or of want of notice, it is a question for the jury whether he does not thereby admit that all the steps that are essential *266] to create liability in him, have been duly taken. The letters, then, *being admissible, do they warrant the conclusion the jury have come to? They seem to me to show that the defendant was conscious that there had been a protest, and that he had had notice; otherwise he would not have put his non-liability to pay upon the ground he did. He is evidently struggling to avoid payment of the bill. If, instead of mentioning that which would have been a good answer, he sets up something foreign, that is an admission, according to all the cases, that the good ground of defence does not exist. And that is exactly what the defendant has done here. The letters are altogether silent as to the want of protest or notice: the objection to pay the bill is put upon the ground of some supposed inaccuracy in the accounts between the parties: in other respects, the defendant admits his liability; and this, according to *Patterson v. Becher*, is sufficient. The answer now attempted to be set up, is, that the letters contain a mere conditional promise to pay. But, when we are determining the point by reference to what is supposed to have been passing in the mind of the defendant, it is quite immaterial whether the promise is conditional or not. *Wilkins v. Jadis*, 1 M. & Rob. 41, is a much stronger case than the present. There, proof that the drawer knew, two days after its maturity, that the bill was unpaid, and in the hands of a particular endorsee, and objected to pay it *on the ground of*

(a) There, as well as in *Wilkins v. Jadis*, (post, p. 266,) it was immaterial, upon non assumption, whether the defendant had admitted notice, or had dispensed with notice. Since the new rules of pleading, if the defendant were to traverse the notice alleged in the declaration, and in another plea, to set up a dispensation, there would appear to be a difficulty in saying which plea the evidence established. In the principal case, such ambiguity, had it existed, might have been material; but, upon the correspondence, the question of waiver could hardly arise.

fraud in the obtaining of it, was ruled by Lord TENTERDEN to be evidence to go to the jury that he had received regular notice of dishonour; and this ruling was not questioned, though a new trial was moved for upon another ground. (a) I am clearly of opinion that this case was properly submitted to the jury, and properly decided by them.

COLTMAN, J. I am of the same opinion. If a promise to pay were necessary to give the plaintiff a right *of action, the promise to be gathered from the letters in this case, being conditional only, [*267 might not have sufficed to entitle the plaintiff to recover. I do not apprehend, however, that a promise was necessary; an admission of liability is enough to warrant the jury in inferring, that all the steps necessary to create such liability have been duly taken. The cases cited show that admissions much less strong than those contained in the defendant's letters will suffice for that purpose.

MAULE, J. I am of the same opinion. This rule was obtained on the 11th of June. The defendant has, therefore, succeeded in obtaining a delay of five months, which evidently was his sole object. It appeared to me at the time, that there was no ground for the motion. The only case that has been cited for the defendant is *Burgh v. Legge*, which has nothing at all to do with the point now before us. *Patterson v. Becher* and *Wilkins v. Jadis* are conclusive in favour of the plaintiff. The defendant, in his letter of the 12th of October, 1844, after referring to some former correspondence as to a 50*l.* bill and the accounts between the plaintiff and himself, as to the bill in question, says that he will cause it to be paid immediately, but insists on a particular mode of payment. The promise to pay is absolute, but conditional only as to the mode. The letter is an express and distinct admission of his liability on the bill. Now, he could not be liable to pay the bill, unless there had been a regular protest, and due notice thereof given to him. And no jury could possibly infer from the letters any other than that the defendant had had such notice. The only question is, whether the evidence was properly left to them. *Wilkins v. Jadis* differs from the present case only in this, that there the evidence was considerably weaker; and still it was held sufficient to go to the jury. I think the jury would *clearly have [*268 done wrong had they come to any other conclusion than that at which they arrived. I also think that they were properly directed.

ERLE, J. I also am of opinion that this rule must be discharged. An admission by a party of his liability on a bill, is an admission that all has been done which is requisite to constitute such liability. I think the letters in question were evidence of a protest and of notice thereof to the defendant, both of which were necessary (b) to entitle the plaintiff to maintain his action.

Rule discharged.

(a) 2 B. & Ad. 188.

(b) Vide tamen *supra*, 265 (b).

BELL and Others, Assignees of HOOD, a Bankrupt, v. COLEMAN.

Nov. 12.

The exception in the 2 & 3 Vict. c. 37, (continued by 3 & 4 Vict. c. 83, 4 & 5 Vict. c. 54,) as to loans or forbearance of any money upon security of lands, tenements, or hereditaments, or any estate or interest therein, is not retrospective.

A. became indebted to B. in 1000*l.*, upon bills discounted at usurious interest, (since the 7 W. 4, & 1 Vict. c. 80,) and being afterwards pressed for payment, deposited with B., as collateral security, a deed for securing an annuity payable out of real property, nothing being said, at the time, as to the rate of interest to be paid for the further forbearance. A bill for 1000*l.* was afterwards given by A. to B. in respect of the debt, and renewed from time to time at 10*l. per cent.* interest. All this took place prior to the passing of the 2 & 3 Vict. c. 37:—*Held*, that the subsequent dealing in respect of the bills did not invalidate the deposit of the deed.

THIS was an action of trover, brought by the plaintiffs, as assignees of one John Lionel Hood, a bankrupt, to recover damages for the wrongful conversion of a certain indenture bearing date the 16th of March, 1830, made between M. R. Kymer, therein described, of the one part, and the bankrupt, of the other part.

*269] The defendant pleaded—first, not guilty; secondly, that the said indenture was not at the time when, &c., the indenture of the plaintiffs, as assignees, *modo et formâ*.

The cause came on for trial before TINDAL, C. J., at the sittings in Middlesex after Easter term, 1841, when a verdict was found for the plaintiffs, damages 5000*l.*, subject to the opinion of the court upon the following case:—

The plaintiffs were the assignees of the said John Lionel Hood, under a fiat in bankruptcy issued on the 1st of May, 1839. The plaintiffs proved a demand by them of, and a refusal by the defendant to deliver, the deed which was the subject of the action. The plaintiffs put in and read the examination of the defendant under the fiat; which is to be taken as a part of the case, and is as follows:—“That, on or about the 2d of May, 1837, this deponent discounted a bill for 500*l.*, dated the same day, drawn by F. Lock upon and accepted by the bankrupt, payable three months after date, to the order of Lock, and endorsed by him to this deponent; and that, for the discounting thereof, this deponent took the sum of 12*l.* 10*s.*: That, on the 5th of the same month, deponent discounted another bill, bearing date that day, for the like amount, and drawn, accepted, and endorsed and made payable at the same time; and that, for the discounting thereof, deponent took the like sum of 12*l.* 10*s.*: That those bills were not paid, and deponent refused to renew them without security, and they lay overdue until the 14th of December, 1837, when Lock brought a bill, accepted by the bankrupt, for 1500*l.*, on which deponent gave Lock a memorandum that only 1000*l.* belonged to deponent, and he told Lock, that, unless the bill was paid, or a security was handed to him, he would sue both parties: That, in the latter end of February,

1838, Lock brought to deponent an assignment, (the deed mentioned in the *declaration,) bearing date the 16th of March, 1830, of an annuity of 100*l.*, being a portion of an annuity of 515*l.* issuing out of certain closes, &c., specified in the said deed, payable during the lives of C. Alliston, G. Alliston, S. Mac Taggart, and E. M. Dymock, and deposited the same with deponent as security for the 1000*l.* due to him : That, on the 15th of March, 1838, the bankrupt was brought to deponent by Lock, and accepted a bill for 1000*l.*, drawn by Lock, in lieu of the former bill for 1500*l.* ; and, on the 15th of June, 1838, another bill, in like manner drawn, accepted, and made payable, for 1000*l.*, was discounted by deponent, in renewal of the last bill ; and, on the 15th of September, 1838, another bill, in like manner drawn, accepted, and made payable, for 1000*l.*, was discounted by deponent, in renewal of the last bill ; and, on the 15th of December, 1838, another bill, in like manner drawn, accepted, and made payable, for 1000*l.*, was discounted by deponent, in renewal of the last bill ; which last bill is now in deponent's possession : That, on each renewal, both before and after the assignment was lodged with deponent, he charged and received interest at the rate of 10*l. per cent. per annum* : That the deed of assignment of the annuity was never assigned to deponent : And that deponent has not any written undertaking from the bankrupt, deponent not requiring it, under the assurance that this was a temporary loan, and would be repaid when the bill became due.”

In 1830, Lock, then solicitor in London, and solicitor and agent for the bankrupt, invested 999*l.* for him in the purchase of an annuity secured by the deed in the declaration mentioned, which was never given up by Lock to the bankrupt, but was retained and disposed of by Lock under the circumstances hereinafter set forth.(a)

*In 1836 or 1837, the bankrupt entered into business as a manufacturer. He required all his funds for the purposes of capital. Lock was particularly intimate with him. At that time the bankrupt had never raised money. Afterwards he employed Lock in raising one sum of 10,000*l.* Lock raised 7000*l.* on mortgage in one sum, and the rest in different advances from himself, Lock, out of moneys in his hands. Lock knew the defendant, Coleman. He was a family connection of Lock's ; but Lock was not very intimate with him. Coleman never employed Lock to put out money for him. He lent Lock 4000*l.* in June and July, 1835. Coleman made an application to Lock, stating that he had retired from business, and that he thought, if Lock had capital, it would be advantageous to him, Lock (*sic*) ; that he had 4000*l.* or 5000*l.* ; that, if Lock would pay him 10*l. per cent.*, it was at Lock's disposal, to do what he liked with. Lock got 4000*l.* from him within ten days or a fortnight from the first advance to the last. Lock gave, for 2000*l.* of it, his own note, either a promissory note made by himself alone, or an acceptance by him of a bill drawn by the defendant ; for another 1000*l.* of

(a) What follows would appear to be partly statement and partly deposition.

the 4000*l.*, Lock gave an acceptance of a Captain H., of the navy, to a bill drawn by Lock; for another 500*l.*, Lock gave an acceptance of one Burton to a draft of his, Lock's; the other 500*l.*, being the remainder of the 4000*l.*, was either secured by a note of Lock's, or an acceptance, by Lock, of the defendant's draft. At that period, July, 1835, Lock had that 4000*l.*

Lock advanced to the bankrupt, at different times, between 4000*l.* and 5000*l.*, besides the 7000*l.* on mortgage. The earliest advance made by Lock to the bankrupt was in 1837. That was after the mortgage. Lock made advances to the bankrupt from time to time. He had entered into a large undertaking, and required all his own funds and any assistance *272] Lock could render him. He gave Lock some Mexican shares or bonds, upon which Lock borrowed money, and gave it to him. He did not give Lock the deed in the declaration. Lock kept that from the day it was prepared. Lock had it from the date of its execution. He had kept it with the bankrupt's other papers, which were under Lock's care as his attorney. Lock had the bankrupt's authority to use it the same way as the other documents. Whilst these money transactions were going on, at first, the bankrupt was at Newcastle-upon-Tyne. During that time he applied to Lock by letters.(a)

The bankrupt came to London after writing the letters, and settled there—in the commencement of 1837, or extreme end of 1836. He continued to be in want of money. Lock saw him almost daily. The bankrupt lived in the street adjoining Lock. Lock then acted for him in this way:—The bankrupt frequently urged Lock to obtain the money he had invested on the annuity, by getting rid of it through Lock. Lock had not received the shares at that time. He had the deed and shares in his hands at the same time. When he said that he had not received the shares at that time, by "that time" he meant the time when the bankrupt came to London. He had the deed and shares in his hands at the same time he had conversations with the bankrupt as to raising money on the shares. He was constantly applied to by the bankrupt to know if he could not raise the money on the deed. Lock thinks that the first advance he made to the bankrupt was in 1837. He had not money of his own to lend; but it was money in his possession. He had 4000*l.* from the defendant. Two bills drawn by Lock upon the bankrupt, for 500*l.* each, were put into the defendant's hands. The defendant had advanced *273] Lock 2000*l.* on his own security. At that period, (1837,) Lock owed the defendant 1000*l.* on his own name, either from the circumstance of its having been advanced to him originally on his own name, or from Captain H. being then dead insolvent (whose executor Lock was)—he, Lock, did not keep accounts, and therefore he could not say which of the two circumstances was the correct one—but 1000*l.* was so situated, and the defendant required an additional name. Lock ap-

(a) The letters were set out in an appendix, and were to be taken as part of the case.

plied to the bankrupt, to whom he had then advanced about 3000*l.*, or a larger sum than 3000*l.*, and requested the bankrupt to give him (Lock) his acceptance; and the bankrupt gave him two acceptances of 500*l.* each. Lock believes that he had no security from the bankrupt at that time, except that deed which he had in his possession; and he considered he had a right to require from the bankrupt the whole 3000*l.*; but he did in fact only require the 1000*l.* He (Lock) was at that time the grantee of the annuity, and could have received it—could have paid himself, in truth. When these two 500*l.* bills became due, they were renewed by an acceptance, of the bankrupt, of a draft of Lock's, for 1500*l.*, a memorandum being taken from the defendant, that it was only to secure 1000*l.* The defendant objected to Lock's having drawn for 1500*l.*, and there was a memorandum that only 1000*l.* was for him. Subsequently, the defendant applied for further security: Lock thinks, in the commencement of 1838, but he could not say positively to a month or so. In December, 1837, he had advanced the 4000*l.* to the bankrupt: Lock thinks it was upwards of 4000*l.* at that time. Lock had then sold the shares; but there was, in December, 1837, about 4000*l.* owing to him, after giving credit for the proceeds of those shares. At that time he had the deed in his possession; and the bills, either the 1000*l.* or the 1500*l.*, were running. A *bill of 1000*l.* was taken instead of that for [274 1500*l.* That 1000*l.* was renewed once or twice after. On the defendant requiring further security, Lock took him the deed. Lock deposited it with the defendant as security for the bankrupt's 1000*l.* acceptance. The defendant did require further security, and was inclined to be troublesome; and Lock gave him the deed to keep him quiet. Lock had no authority from the bankrupt to pledge it to the defendant particularly; not in express terms. Lock was urged frequently by the bankrupt to obtain money on that deed, verbally and by the letters. He should say that he had authority to dispose of that deed in the course of those money transactions. Lock was secured for the advances, to the extent of the value of the deed and the shares. His authority as to the deed and the shares was the same. The bankrupt never made any complaint as to the shares. Lock thinks the bankrupt applied to him, after he had deposited the deed with the defendant, to know if he (Lock) could not get money for him on that deed. Lock did not tell the bankrupt that he had deposited the deed with the defendant. Lock had a motive for not telling the bankrupt. If he had told him that he had pledged his deed, it would have been telling him that he (Lock) was distressed by the advances he had made to the bankrupt. It was from motives of delicacy,—not to let him know that he (Lock) was distressed by the advances he had made to the bankrupt. It was some time before Hood's bankruptcy that Hood asked to know if he (Lock) could get money on the deed. If he had not parted with the deed to the defendant, he should then have been holding it on the same terms as he had been all along.

He did not remember that afterwards, until his (Hood's) bankruptcy, Hood pressed him, Lock, any more on the subject of the deed. No assignment was *made to the defendant; he did not require any *275] from him, Lock. Lock had required none from the bankrupt. The bankrupt, at the time of his bankruptcy, was indebted to him, Lock, in 2300*l.*, exclusive of interest; 2500*l.* of what he had owed him had been paid off by money borrowed upon the joint security of the bankrupt and Lock, for which a judgment was obtained against Lock, the bankrupt not having paid it. Lock had not paid it. He (Lock) had authority to pledge the deed—had authority from the bankrupt to part with the deed for such purposes as he did part with it for to the defendant. He had no special authority with respect to the deed—a general authority, to all the world.

The court is to have authority to draw any inference of fact from the matters stated, which a jury ought to draw.

The question for the opinion of the court is, whether the plaintiffs are entitled to recover. If the court are of that opinion, the verdict is to stand, but the damages are to be reduced to 40*s.*, on the deed being given up to the plaintiffs. If the court are of a contrary opinion, a verdict is to be entered for the defendant.

. *Channell*, Serjt., (with whom was *Petersdorff*.) for the plaintiffs. Two questions arise in this case—first, whether Lock had authority to pledge the indenture of the 16th of March, 1830; secondly, assuming that he had such authority, whether the transaction was tainted with usury.

It appears from the case, that Lock was the attorney of the bankrupt, and that the annuity secured by the deed in question was payable to Lock as trustee for him. The state of accounts between the parties was this: Lock, who had advanced money to the bankrupt, and who at that *276] time had the deed in his possession, was indebted *to the defendant. He was the principal debtor, though the bankrupt was also liable to the defendant as surety. Supposing Lock had authority to pledge the deed for the purpose of raising money for the benefit of the bankrupt, there is nothing in the case to warrant the inference that he had authority to pledge it for securing this particular debt, for which he himself was primarily liable. The fair inference from the whole case is, that Lock had authority to sell the annuity, or to pledge it, for a fresh and actual advance of money to the bankrupt. [MAULE, J. The case finds distinctly that Lock had authority to pledge the deed in the way he did.]

Assuming, then, that Lock had authority to deal with the indenture in the manner he has dealt with it, and that, under the old law, the transaction would have been objectionable on the score of usury, the only remaining inquiry is, how the case is affected by the recent statutes. The 3 & 4 W. 4, c. 98, s. 7, enacts, "that no bill of exchange or promissory note, made payable at or within *three* months after the date thereof, or not having more than *three* months to run, shall, by reason of any interest

taken thereon or secured thereby, or any agreement to pay or receive or allow interest in discounting, negotiating, or transferring the same, be void, nor shall the liability of any party to any bill of exchange or promissory note be affected, by reason of any statute or law in force for the prevention of usury; nor shall any person or persons drawing, accepting, endorsing, or signing any such bill or note, or lending or advancing any money, or taking more than the present rate of legal interest in Great Britain and Ireland respectively for the loan of money on any such bill or note, be subject to any penalties under any statute, or law relating to usury, or any other penalty or forfeiture." The 7 W. 4, and 1 Vict. c. 80, extends the above provision to bills or notes made *payable at or within *twelve* months after the date thereof, or not having more [277] than *twelve* months to run, and also applies it to bodies corporate. And the 2 & 3 Vict. c. 37, s. 1, reciting the last-mentioned act, enacts, "that no bill of exchange or promissory note made payable at or within *twelve* months after the date thereof, or not having more than *twelve* months to run, nor any contract for the loan or forbearance of money above the sum of 10*l.*, shall, by reason of any interest taken thereon or secured thereby, or any agreement to pay or receive, or allow interest in discounting, negotiating, or transferring any such bill of exchange or promissory note, be void, nor shall the liability of any party to any such bill of exchange or promissory note, nor the liability of any person borrowing any sum of money as aforesaid, be affected, by reason of any statute or law in force for the prevention of usury; nor shall any person or persons, or body corporate, drawing, accepting, endorsing, or signing any such bill or note, or lending or advancing or forbearing any money as aforesaid, or taking more than the present rate of legal interest in Great Britain and Ireland respectively for the loan or forbearance of money as aforesaid, be subject to any penalties under any statute or law relating to usury, or any other penalty or forfeiture: provided always, that nothing herein contained shall extend to the loan or forbearance of any money upon security of any lands, tenements, or hereditaments, or any estate or interest therein." In *Ex parte Knight, in re Pownall*, 1 Deac. 459, a creditor advanced money to the bankrupt by discounting bills payable within three months from the date, and on the security of the deposit of goods, and took more than 5*l. per cent.* for the discount: and it was held by the majority of the court, that the transaction was within the provisions of the 3 & 4 [278] *W. 4, c. 98, s. 7, and therefore not usurious. But, in *Berrington v. Collis*, 5 N. C. 332, 7 Scott, 302,(a) it was held by this court that a loan upon usurious interest secured by the deposit of a lease and a warrant of attorney, is not brought within the protection of the 7 W. 4, and 1 Vict. c. 80, by the addition of a promissory note as a further security. TINDAL, C. J., in delivering the judgment, there says: "We think such a transaction is not brought within the words of the statute of 3 & 4 W. 4,

(a) And see *Flight v. Hammond*, 2 M. & G. 383, n.

c. 98, s. 7, or the 1 Vict. c. 80; those acts contemplating the case of interest taken upon or secured by a bill of exchange or promissory note, as the real and *bonâ fide* ground of the debt; and not extending, or meant to extend, to the case of a bill of exchange or promissory note given in addition to a security of another nature, not protected by the statute, upon which the debt was really contracted; for, if the latter case should be held to be comprised within the act, it would in effect nearly operate as a general repeal of the statute of usury, by enabling persons who had lent money upon mortgage at usurious interest to sue for and recover principal and interest upon a bill or note, though the mortgage security might be void; and even to enforce a valid security upon the land for the principal, if the usurious interest should not be reserved by the mortgage: and we think the case of *Ex parte Knight, in re Pownall*, 5 N. C. 332, 7 Scott, 302, is clearly distinguishable from the present. The contract in that case was an express and specific contract of discount upon various bills of exchange, and nothing else: not at all varied or modified in its nature by reason of the lender having at the time collateral securities in his hands for the repayment of moneys that might become due; but, in this

*279] case, the contract is of a loan upon the pledge of the *title-deeds. And in *Connop v. Meaks*, 2 Ad. & E. 326, (a) the discount of the bills of exchange being legalized by the statute 3 & 4 W. 4, c. 98, there could be no reason why a warrant of attorney, given subsequently as a security for such legal debt, should not be valid also. But, as the loan in the present case was not, in our opinion, really made upon the security of the promissory note, the discount taken makes the debt invalid; and consequently, we think the warrant of attorney given for such illegal debt is invalid also." Applying the principle of that case to the present, it appears, that, on the 2d of May, 1837, the defendant discounted for Lock a bill at three months' date for 500*l.*, and on the 5th a second bill of the same date and for the same amount, both drawn by Lock and accepted by the bankrupt; that these bills not being honoured when they arrived at maturity, Lock brought the defendant another bill, also drawn by himself and accepted by the bankrupt, for 1500*l.*, which he left with the defendant as security for the 1000*l.* due on the two former bills; that the defendant then told Lock he would sue both parties unless that bill was paid, or security given for the debt; and that Lock, in February, 1838, deposited the deed in question with the defendant as collateral security. The question is, whether the three bills for 1000*l.* each, given in March, June, and September, 1838, are to be treated as new loans from time to time,—the bills being the primary security, and the deposit of the deed collateral only,—or whether the bills were not taken merely as a colour for evading the usury laws. [MAULE, J. Under the old law, the transaction would, unquestionably, have been usurious. ERLE, J. The de-

(a) S. C. per nom. *Connop v. Yates*, 4 N. & M. 302.

defendant threatened to sue, if the 1000*l.* overdue in 1837 were not paid, but he was induced to *forbear* doing so by the deposit of the [*280 *annuity deed.] In *King v. Braddon*, 2 P. & D. 546, to an action against the acceptor of a bill, the defendant pleaded, that, before, &c., he was indebted to the plaintiff on an account stated, that it was corruptly agreed that he, the defendant, should pay part of the debt, and should have three months forbearance, and accept a bill at that date for payment of the residue, and should pay a sum exceeding 5*l. per cent.* for such forbearance, and that the stipulated sums were paid, and the bill in question was given, accordingly; and it was held that the transaction was exempted from the usury laws by the 3 & 4 W. 4, c. 98, s. 7. That case is exactly in point, unless the advance here is to be taken to have been made upon the deposit of the deed as the primary security. In *Ex parte Terrewest, in re Poynter*, 3 Deac. 590, the petitioner lent the bankrupt 1600*l.* on his promissory note, payable three months after date, renewable for the same period, at the option of the bankrupt, but so as not to exceed the period of eighteen months in the whole; the bankrupt undertaking to pay 7½ *per cent.* interest, and 3*l. per cent.* for insurance: the note was renewed four times successively, and, on each renewal, the same rate was deducted for interest and insurance: and it was held that the transaction was not protected by the 3 & 4 W. 4, c. 98, s. 7, and was consequently usurious, and the note incapable of proof. Sir John Cross, delivering the judgment of the court, said: "The fabrication of a series of notes renewable every three months, instead of a single note for a longer or an indefinite time, was merely a shift and colourable contrivance to evade the usury laws, which no court of law or equity can sanction." The question here is, whether the court will not draw the inference that the renewals were in consideration of the deposit of the deed. In *Doe d. Haughton* [*281 *v. King*, 11 M. & W. 333, a party having applied to the defendant for the loan of a sum of 6700*l.* for twelve months on the security of a mortgage of freehold property, the defendant refused to lend the money, unless the borrower would give him a promissory note for the amount, to be discounted by him at 5*l. per cent.*: this, the borrower agreed to do; a bond and mortgage were executed for the 6700*l.*, and the sum of 6365*l.*, the amount of the note *minus* the discount and charge of preparing the securities, was paid to the borrower. An ejectment having been brought to recover the possession of the premises, on the ground that the mortgage was invalid as being given for an usurious consideration, the jury found that the primary object of the transaction was the discounting of the note, the mortgage being only a collateral security, in the event of the note not being paid; and the court held that the transaction was not usurious, and that the mortgage was valid, independently of the 7 W. 4, & 1 Vict. c. 80, and 2 & 3 Vict. c. 37. And PARKE, B., said: "I wish not to be understood as expressing any doubt that the transaction would have been valid, even if 10*l.* or 20*l. per cent.* had been agreed to be paid

in this case ; because the statute 7 W. 4, & 1 Vict. c. 80, was in force at the time of the contract, and there is nothing in that statute rendering it less legal to protect such a payment by security on land than in any other way. *Under the statute 2 & 3 Vict. c. 37, it is indeed different ;* because that statute contains an express proviso that nothing therein contained shall extend to the loan or forbearance of any money ‘upon security of any lands, tenements, or hereditaments, or any right or interest therein.’ It is, however, unnecessary to give any opinion on this part of the case.

*282] because, even dealing with it according to the principles of ‘the old law, the jury have by their verdict decided the security to be valid.’ And in *Hodgkinson v. Wyatt*, 1 D. & Mer. 443, it was held, that, where a loan secured by a bond is also collaterally secured by the deposit of title-deeds of leasehold lands, such a contract is not protected by the 2 & 3 Vict. c. 37, s. 1, being within the proviso at the end of that section, as to a loan on the security of lands, tenements, &c. ; and that the statute is retrospective. It is therefore submitted that in this case the deposit was void, and that the plaintiffs are entitled to recover.

Talfourd, Serjt., (with whom was *Crompton*,) contra. There is nothing in any of the cases cited, to invalidate the pledge in question. It may be conceded that, if it were necessary to resort to the 2 & 3 Vict. c. 37, s. 1, to legalize the transaction, the defendant could not avail himself of the enacting part of that section, and reject the proviso. In *Hodgkinson v. Wyatt*, the defendant did require the aid of that statute, the transaction not being protected by the former statutes. Here, however, the last renewal of the bills took place prior to the passing of the 2 & 3 Vict. c. 37. As the law then stood, there was a sum of 1000*l.* clearly due to the defendant, from Lock and the bankrupt, in respect of the two 500*l.* bills. [TINDAL, C. J. You have to combat that which took place after the deposit of the deed, viz., the further forbearance, in consideration of the deposit. MAULE, J. The original loan was upon two bills for 500*l.* each, continued by three subsequent renewals for 1000*l.* each. It was a continuing loan of 1000*l.* The question is, whether land might be pledged to secure this continuing loan.] Suppose the deed had been originally deposited to secure 1000*l.* then really and legally due, and a bill were

*283] afterwards taken at usurious interest—‘that clearly would not invalidate the original pledge. *Doe d. Haughton v. King*, is, in principle, a distinct authority to that effect. [MAULE, J. Here the defendant might have sued to judgment on the bills, and have taken the land under an *elegit*.] The court will have no difficulty in seeing that this was a *bonâ fide* loan on the security of the bills, and that the deed was deposited simply as a security. The true test is, as in *Berrington v. Collis*, whether the borrower would have obtained the money but for the real security. This was a mere collateral deposit, in respect of a transaction in itself perfectly legal.

Channell, Serjt., in reply. The effect of the statutes is, to remove

from certain bills the vice of usury, not to render valid securities upon reality. [MAULE, J. At the time the deed was deposited, the two 500*l.* bills were overdue. There was then a lawful debt of 1000*l.* due from Lock and the bankrupt to the defendant. What was there to prevent the defendant from taking a real security for that debt? There does not seem to have been any agreement at that time that the 1000*l.* should carry interest at more than 5*l. per cent.*]

TINDAL, C. J. It appears to me that in this case there must be a verdict for the defendant: and the ground upon which I found that opinion is, that there was originally a valid deposit of the deed in question, and that nothing has taken place since to invalidate such deposit. It appears from the case, that, in February, 1838, there was a debt of 1000*l.* due from Hood, the bankrupt, to Coleman, the defendant, upon two dishonoured acceptances for 500*l.* each. And, although more than 5 *per cent.* had been taken by the defendant on the discounting of those bills, still, as the law then stood, and as it now stands, it was a valid *debt. [*284 The moment the defendant required payment of this debt, in order to quiet him, the deed in question was put into his hands by Lock with the authority of the bankrupt. At that time, therefore, the deed was a valid and subsisting security for the 1000*l.* It is true, that, since that time, the two 500*l.* acceptances have been several times renewed at a higher rate of interest than 5 *per cent.*: but that bargain was made without reference to the deed which had already been deposited. It would be strange to hold a deposit, good and valid at the time it was made, to be invalidated by that which afterwards took place. All the subsequent dealings in respect of the bills took place before the passing of the 2 & 3 Vict. c. 37, the proviso of which does not, by any retrospective force, operate on by-gone transactions.

COLTMAN, J. I am of the same opinion. This case is to be decided as if the 2 & 3 Vict. c. 37 had never passed at all. I cannot conceive that it was the intention of the legislature to invalidate a contract valid at the time it was entered into. That being so, the *dictum* of Parke, B., in *Doe d. Haughton v. King*, is a direct authority for our present decision. There is nothing, that I am aware of, to prevent a man from taking landed security for a legal debt.

MAULE, J. I also think the defendant is entitled to judgment in this case. The bankrupt was indebted to the defendant in 1000*l.* upon two bills of exchange. That was a lawful debt, for it has not been shown that it was contracted in a manner prohibited by law. The debt being a lawful debt, and capable of being enforced, it was agreed between the bankrupt, the debtor, and the defendant, the creditor, that the debtor should not be called upon for immediate payment, but should deposit with the defendant, by way of collateral security *for the payment of the 1000*l.*, a deed relating to real property, nothing being [*285 said at the time about the rate of interest. I can see nothing unlawful in

that transaction, nor is it at all affected by the subsequent bill transactions.

ERLE, J. It appears to me also that the judgment in this case must be for the defendant. The original debt upon the bills of exchange, was within the protection of the 3 & 4 W. 4, c. 98, s. 7, and the transaction stands wholly independent of the 2 & 3 Vict. c. 37. In *Connop v. Meaks*, the protection of the statute of 3 & 4 W. 4, c. 98, s. 7, was held to extend to a warrant of attorney given to secure payment of the bills. And, when we come to the case of *Berrington v. Collis*, we find the question considered by the court was, whether the deposit of the lease, or the promissory note and warrant of attorney, was the primary security; and, being of opinion that the loan was not really made upon the security of the promissory note, they held the security to be invalid. And in *Doe d. Haughton v. King*, though the negotiable instrument was not tainted with usury, PARKE, B., throws out an opinion in conformity with the decision of this court in *Berrington v. Collis*. It appears to me, therefore, that the deposit of the deed in this case, being prior to the passing of the 2 & 3 Vict. c. 37, was a valid deposit.

Judgment for the defendant.

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*SMITH v. F. NESBITT. Nov. 12.

In an action upon a covenant by the defendant, that he would pay over to the plaintiff the first fruits or proceeds which should be first realized, and "be at the disposition of the defendant," under a sequestration, "forthwith upon the receipt thereof," the declaration alleged that divers moneys, being first fruits and proceeds, were realized, and were at the disposition of the defendant, and that he had not paid them over to the plaintiff:—*Held*, sufficient, on special demurrer, and that it was not necessary to aver actual receipt of the money by the defendant.

COVENANT. The declaration stated, that, by indenture made between one Henry Nesbitt of the first part, the defendant of the second part, and the plaintiff of the third part—after reciting that a writ of *sequestrari facias* had issued against the ecclesiastical goods and benefice of the Rev. C. Wetherell, to recover a judgment debt of 1500*l.* due to the defendant, that this judgment debt had become the property of H. Nesbitt, and that H. Nesbitt was indebted to the plaintiff in 300*l.*—the defendant covenanted with the plaintiff, that he, the defendant, *would pay over the first fruits or proceeds which should be realized, and be at the disposition of the defendant, under the said sequestration*, or on account of the said judgment debt, *forthwith upon the receipt thereof*, to the plaintiff, in part or full satisfaction, as the case might be, of the said sum of 300*l.* Averment, that, although divers moneys, amounting, &c., being the first fruits and proceeds, &c., *were realized, and were at the disposition of the defendant under the said sequestration*, yet the defendant had not paid over the said moneys, or any part thereof.

Special demurrer, assigning for cause that the declaration did not allege that the first fruits or proceeds sought to be recovered had been *received* by the defendant.

Joinder in demurrer.

Byles, Serjt., (with whom was *Cleasby*.) in support of the demurrer Actual receipt by the defendant of the first fruits and proceeds is, by the terms of the covenant, *made a condition precedent to the obligation to pay; and the allegation that they had been realized and [287] were at the disposition of the defendant, which is mixed up with the breach, is insufficient. The living being sequestered, the bishop, by his officer, receives the profits by degrees; and, when he has received enough to satisfy the judgment, or when there is no more to receive, and not till then, he pays the amount over, and returns the writ. How can it be said here that the money has been received by the defendant? [TINDAL, C. J. Virtually and substantially it is at his disposal. The declaration so alleges, and there is no traverse.]

Channell, Serjt., contra, was stopped by the court.

TINDAL, C. J. This sequestration is a continuing process, under which the judgment creditor is entitled to the growing profits. It was his duty to go to the officer of the bishop and obtain them. Otherwise he would be guilty of a breach of the engagement he had entered into, and, by his own voluntary default, disappoint the plaintiff of his just rights. We must look to the substance of the covenant, and not at the mere form.

MAULE, J. The defendant covenants that he will pay over the first fruits or proceeds which shall be realized and at his disposition under the sequestration forthwith upon the receipt thereof. That means as soon as they are realized, and he has power to receive them. It was his duty to apply for them.

The rest of the court concurred.

Judgment for the plaintiff.

The court refused to refer it to the master to compute principal and interest on a covenant to pay over to the plaintiff the first fruits or proceeds which should be realized, and be at the disposition of the defendant, under a writ of *sequestrari fucias*.

Judgment having been signed for the plaintiff, a rule *nisi was [288] obtained on a subsequent day to compute principal and interest.

Nov. 24. *Byles*, Serjt., now showed cause. This is not the proper subject of a rule to compute—a mode of proceeding that is only applicable to a mere question of figures. Here, the master would have to enter into a long inquiry as to what has been received under the *sequestrari fucias*, and to take the account as between the bishop and the defendant, and then as between the defendant and the plaintiff. The demurrer only admits the receipt of moneys to the extent of 1s. The authorities are numerous to show that this is not the proper course. In *Messin v. Lord Massareene*, 4 T. R. 493, the defendant having suffered judgment by default in an action of assumpsit on a foreign judgment, the

court refused to refer it to the master to ascertain what was due; Lord KENYON saying: "This is an attempt to carry the rule further than has yet been done; and, as there is no instance of the kind, I am not disposed to make a precedent for it." In *Cooke v. Pettit*, 2 Wils. 5, the court refused, in an action of debt upon a bond to save the parish harmless from keeping a bastard child, to refer it to the prothonotary to compute how much the parish was damnified. So, in *Denison v. Mair*, 14 East, 622, (a) in covenant upon a deed of indemnity whereby the plaintiffs covenanted to indemnify the Bank of England against advances to L. and B. on bills of exchange, to the amount of 100,000*l.*, and the defendant and others agreed to indemnify the plaintiffs to the same amount in certain aliquot proportions, of which the defendant's proportion was 5000*l.*—after judgment for the plaintiffs on demurrer, the court *289] refused to refer it to the master to *compute the principal and interest due on the deed; considering that it was not a mere question of computation of principal and interest, but that it was open to the defendant, before the sheriff's jury, to enter into questions of collateral satisfaction of the plaintiff's demand from securities and effects of L. and B., the principals, in their hands. And Lord ELLENBOROUGH said: "It would be a great innovation upon our general practice, and would be attended with some inconvenience, to send such an inquiry to the master. I hold this opinion, notwithstanding I am satisfied that the true motive of the defendant in resisting the application, is for delay: but I cannot, in order to defeat that purpose, overleap the bounds which the court has wisely set to itself for administering justice upon these occasions." In *Nelson v. Sheridan*, 8 T. R. 395, the court refused to refer it to the master to ascertain the damages sustained by the plaintiff, on an interlocutory judgment in debt on a judgment in an action brought on a bill of exchange. In *Tidd's Practice*, 9th edit. p. 571, it is said that this practice "is confined to cases where it appears on the declaration, that the action is brought upon bills of exchange or promissory notes, or other actions wherein the *quantum* of damages depends on figures, and may be as well ascertained by the master as before a jury." The practice is similarly laid down in *Archbold*, 7th edit., by Chitty, p. 709.

Channell, Serjt., admitted that he could not sustain his rule against the authorities above cited.

TINDAL, C. J. This certainly involves more than a mere computation, and would be going much further than the practice of the court warrants.

Rule discharged.

(a) And see *Hardcastle v. Netherwood*, 5 B. & Ald. 93; *Auber v. Lewis*, Mann. N. P. Digest, 2d edit., tit. *Set-Off*, and cases there cited.

***THOMEL and Another v ROELANTS. Nov. 14. [*290**

The fact of the plaintiffs having compounded with their creditors, and one of them being resident abroad, is no ground for calling upon them to give security for costs.

CHANNELL, Serjt., moved for security for costs, on the ground that the plaintiffs, who were foreigners, were insolvent, and had shortly before the commencement of the action compounded with their creditors for 10s. in the pound, which composition had not yet been paid, and that one of the plaintiffs was resident at Paris. He cited *Youde v. Youde*, 3 Ad. & E. 311, where it was held, that, in an action brought upon a bond, in the name of an obligee resident abroad, for the benefit of an assignee in this country, the defendant may claim security for costs from the nominal plaintiff.

MAULE, J. Insolvency alone is no ground for calling upon a plaintiff for security for costs: and the residence of one of the plaintiffs abroad carries the case no further.

Per curiam;

Rule refused.

In the Matter of G. D. WOODHOUSE. Nov. 17.

Where an attorney obtains an order for the taxation of his bill of costs, under the 6 & 7 Vict. c. 73, s. 43, he cannot proceed by attachment without first obtaining an order for payment of the amount certified to be due.

A SUMMONS was taken out the 6th instant, calling upon one Leonard Albin to show cause "why G. D. Woodhouse's bill of costs in the causes and matters delivered to Albin, should not be referred to *the [291 masters to be taxed, the said G. D. Woodhouse giving credit for all sums of money by him received from or on account of Albin, and refunding what (if any thing) he may upon such taxation appear to have been overpaid; and why the said masters should not tax the costs of such reference, and certify what shall be due to or from either party in respect of such bill and demand, and of the costs of such reference, (if payable,) to be paid according to the event of such taxation, pursuant to the statute." Upon this summons an order was made, which was afterwards made a rule of court. The master having certified a certain sum to be due to Woodhouse,

Dowling, Serjt., upon the usual affidavit of service, moved for an attachment against Albin for non-payment thereof. He submitted that there was nothing in the statute 6 & 7 Vict. c. 73, s. 43, (a) to interfere with the right to enforce obedience to the order and rule by attachment.

(a) Which enacts, "that all applications made under this act to refer any such bill as aforesaid to be taxed and settled, and for the delivery of such bill, and for the delivering up of deeds, documents, and papers, shall be made in the matter of such attorney or solicitor; and that, upon the taxation and settlement of any such bill, the certificate of the officer by whom such

ERLE, J. The attachment was for contempt of court, for breach of the undertaking entered into on submitting to taxation. The whole essence •292] of the thing *was the party's undertaking. There is here no order to pay which the party has disobeyed. The proper course is, to move for an order upon the party to pay the amount of the allocatur or certificate, and then to proceed by attachment, if that order be disobeyed. The rest of the court concurred. *Dowling* took nothing.

bill shall be taxed shall (unless set aside or altered by order, decree, or rule of court,) be final and conclusive as to the amount thereof, and payment of the amount certified to be due and directed to be paid, may be enforced according to the course of the court in which such reference shall be made; and, in case such reference shall be made in any court of common law, it shall be lawful for such court, or any judge thereof, to order judgment to be entered up for such amount, with costs, unless the retainer shall be disputed, or to make such other order thereon as such court or judge shall deem proper."

SEPPINGS v. NOKES. Nov. 19.

A. assigned to B., by way of security for a loan of 10,000*l.*, two sums of 5000*l.* each, due from C. to A. under two several indentures, and afterwards brought debt against C. upon those indentures:—The court refused to stay the proceedings in the action at the instance of B. and C., and suggested that the proper course was to apply after judgment to stay execution.

By a deed of assignment bearing date the 10th of January, 1845, made between the plaintiff of the first part, the defendant of the second part, and Messrs. Gurney, bankers, of the third part, in consideration of 10,000*l.* lent and paid by the Messrs. Gurney to the plaintiff, the latter, with the consent of the defendant, transferred and assigned to Messrs. Gurney two sums of 5000*l.* each, due from the defendant to the plaintiff under and by virtue of two several indentures bearing date, respectively, the 22d and 24th of June, 1844, and all his, the plaintiff's, interest in the said money, by way of mortgage, and delivered to them the said two indentures, which still remained in their custody.

The plaintiff having brought an action of debt against the defendant upon the indentures above referred to,

Byles, Serjt., moved for a rule calling upon the plaintiff to show cause why the proceedings should not be stayed, and why he should not pay the costs of the application. The motion was made at the instance of the defendant and of Messrs. Gurney, upon an affirmation by one of the firm, stating, that the whole of the money and interest secured by the •293] deed of assignment, was still *due and owing from the plaintiff to them, and that the action was brought without their knowledge, authority, privity, or consent, and contrary to their wish, and that they were desirous that the proceedings should be stayed. The question is, whether this court will so far take notice of the equitable interest of the assignees, for whose interest alone the plaintiff can sue, as to stay proceedings taken for the recovery of the debt contrary to their wish. In

Legh v. Legh, 1 B. & P. 447, (a) it was held, that if the obligor of a bond, after notice of its being assigned, take a release from the obligee, and plead it to an action brought by the assignee in the name of the obligee, the court will set aside the plea. EYRE, C. J., said: "The court has, in many instances, refused to allow a party to take his legal advantage, where it has appeared to be against good faith. Thus, we prevent a man from signing judgment, who has a right by law to do so, if it would be in breach of his own agreement. In order to defeat the real plaintiff, this defendant has colluded with the nominal plaintiff to obtain a release; and I think, therefore, that the plea of release may be set aside consistently with the general rules of the court." And BULLER, J., said: "The court proceeds on the ground that the defendant has, in effect, agreed not to plead payment against the nominal obligee." [MAULE, J. The assignor has still an interest in the debt.] The proceeding is clearly against good faith. A general release given by a trustee, in fraud of his trust, is void: *Manning v. Cox*, 7 J. B. Moore, 617. (b) There, a testator devised to a trustee, to receive the rents for the benefit of his children, *and [*294 gave him power to demise the same for a term, which he did, and received the rents, but did not apply them to the purposes of the trust, upon which a bill in equity was filed against him at the suit of one of the parties beneficially interested under the will, and a receiver was appointed, who sued the lessees, in the name of the trustee, for non-payment of the rent, and they pleaded a release executed to them by the trustee pending the suit; and the court ordered the plea to be set aside, and the release to be delivered up to be cancelled..

MAULE, J. I incline to think that the defendant can have no relief, even in equity, until judgment has been obtained and execution is about to issue.

TINDAL, C. J. I think my brother MAULE has suggested the right course. The application must be after judgment, to restrain the plaintiff from suing out execution.

The rest of the court concurred.

Rule refused.

(a) *S. P. Green v. Williams*, K. B., H. T. 1813, Mann. N. P. Dig. 2d edit, 127. And see 1 M. & G. 238, n.

(b) *Acc. Payne v. Rogers*, 1 Dougl. 407; *Innell v. Newman*, 4 B. & Ald. 419; *Doe d. Locke v. Franklin*, 7 Taunt. 9; *Hickey v. Burt*, Id. 48; *Jones v. Herbert*, Id. 421; *Mountstephen v. Brooke*, 1 Chitt. Rep. 390. And see *Craig v. D'Aeth*, 7 T. R. 670 (b).

By the 6 & 7 Vict. c. 86, s. 21, the proprietor of a hackney carriage is required to retain in his possession the license of every driver, &c., employed by him while such driver, &c., remains in his service. A declaration in case stated, that the plaintiff obtained a driver's license under the act; that he was employed by the defendant, a proprietor of a hackney carriage, and, under the provisions of the act, delivered the license to him; and that, whilst the license remained in the defendant's possession, the latter "wrongfully and unjustly wrote in ink

upon the license certain words purporting, and then being intended by the defendant, to give a character of the plaintiff as an unfit and improper person to act as a driver of hackney carriages, that is to say," &c., &c.; by reason whereof the license became defaced and wholly useless to the plaintiff, and the plaintiff was thereby hindered and prevented from obtaining employment as a driver, &c.:—*Held*, on motion in arrest of judgment, that the action was maintainable,—that case was the proper form,—and that the declaration was sufficient.

CASE. The declaration stated, that, before the committing of the grievances thereafter mentioned, to wit, on, &c., the plaintiffs, under and by virtue of, and according to the provisions of, a certain statute made and passed in the seventh year of the reign of her majesty Queen Victoria, "for regulating hackney and stage-carriages in and near London," obtained from the registrar of metropolitan public carriages, appointed under and by virtue of the said act, and the said registrar then, under and by virtue of, and according to the provisions of the said act, granted to the plaintiff a license for him the plaintiff to act as driver of hackney carriages until the 1st of June, 1846, according to the provisions of the said act. Averment, that, whilst the plaintiff was possessed of the said license, and whilst the said license continued in force, and before the committing of the grievance thereafter mentioned, to wit, on, &c., the defendant, then being a proprietor of a hackney carriage within the purview of the said act, employed the plaintiff to act as driver of such hackney carriage; and the defendant then, under and by virtue of, and according to the provisions of the said statute, delivered the said license to the defendant, to
 *296] be by the defendant retained in his *possession while he, the plaintiff, should remain in the service of the defendant as aforesaid, according to the provisions of the said statute: Breach, that the defendant, well knowing the premises, but contriving to injure the plaintiff, and to deprive him of the benefit and advantage of the said license, and to hinder and prevent him from obtaining employment as a driver of hackney carriages under the said license, whilst the said license continued in force, and whilst the same was so retained in the possession of the defendant as aforesaid, and previously to the same being returned to the plaintiff by the defendant, on the plaintiff leaving the service of the defendant as thereafter mentioned, to wit, on, &c., *wrongfully and unjustly* wrote in ink in and upon the said license certain words purporting to give, and being then intended by the defendant to give, a character of the plaintiff as an unfit and improper person to act as a driver of hackney carriages, that is to say—"Discharged; having been guilty of the most careless, reckless act, in attempting to get on the box, after letting in a fare, without the reins in hand, whereby the horse's knees were dreadfully lacerated, and other injuries sustained: in my opinion, is not a fit and proper person to act as driver of a hackney carriage; the lives of the public are in jeopardy, and the property in his care destroyed;"—the words so written on the said license as aforesaid, not being any entry which, according to the provisions of the said act, the defendant was authorized to make in or upon the said license; and that the defendant

afterwards, and whilst the said license continued in force, to wit, on, &c., last aforesaid, on which last-mentioned day the plaintiff left the said service of the defendant, returned the said license to the plaintiff with the said words so written thereon as aforesaid; by reason of which premises, the said license became and was defaced and damaged, and wholly *useless to the defendant, and the defendant hindered from obtaining employment as a driver of a hackney carriage, by certain persons named. [*297]

The defendant pleaded, first, not guilty; secondly, a justification, which was traversed by the replication.

The cause was tried before CRESSWELL, J., at the first sitting in London during the present term, when a verdict was found for the plaintiff, damages 7*l*.

Byles, Serjt., now moved to arrest the judgment. The declaration, which is framed upon the eighth section of the 6 & 7 Vict. c. 86, "for regulating hackney and stage-carriages in and near London," does not disclose any thing to entitle the plaintiff to maintain an action; or, if there were any cause of action, the proper remedy was trespass, and not case. The eighth section enacts, "that it shall be lawful for the registrar to grant a license to act as driver of hackney carriages, or as driver, or as conductor of metropolitan stage-carriages, &c., to any person who shall produce such a certificate as shall satisfy the said registrar of his good behaviour and fitness for such situation respectively: provided, &c.: and every such license shall bear date on the day on which the same shall be granted, and shall continue in force until and upon the 1st of June next after the date thereof except the same shall be sooner revoked, and except the time (if any) during which any such license shall be suspended; and on every license of a driver or conductor the registrar shall cause proper columns to be prepared, in which every proprietor employing the driver or conductor named in such license, shall enter his own name and address, and the days on which such driver or conductor shall enter and shall quit his service respectively; and in case any of the particulars entered or endorsed upon any license in pursuance of this act, shall be erased or defaced, every such license *shall be wholly void and of none effect," &c. The twenty-first section enacts, "that every proprietor of a hackney carriage, and of every metropolitan stage-carriage, who shall permit or employ any licensed person to act as the driver or conductor thereof, shall require to be delivered to him, and shall retain in his possession, the license of such driver or conductor, while such driver or conductor shall remain in his service; and in all cases of complaint, where the proprietor of a hackney carriage or of a metropolitan stage-carriage shall be summoned to produce the driver or conductor of such carriage before a justice of the peace, he shall also produce the license of such driver or conductor, if at the time of receiving the summons such driver or conductor shall be in his service; and, if any driver or conductor [*298]

complained of shall be adjudged guilty of the offence alleged against him, the justice of the peace before whom he shall be convicted shall in every case endorse upon the license of such driver or conductor, the nature of the offence, and the amount of the penalty inflicted; and every proprietor who shall neglect to require to be delivered to him, and to retain in his possession the license of any driver or conductor during such period as such driver or conductor shall remain in his service, or who shall refuse or neglect to produce such license as aforesaid, shall for every such offence forfeit the sum of 3*l*." And by section 24 the proprietor is required, under a penalty, to return the license to the driver or conductor upon his quitting his service, unless he has any complaint to make, in which case he is empowered to retain it for twenty-four hours. The license, therefore, is the property of the driver. The defendant was entitled to the custody of it, until, by his wrongful act in defacing it, he determined the bailment. The property and the right of possession *299] thereupon immediately revesting in the plaintiff, trespass was the proper remedy; as in the case of a common bailee of goods breaking bulk, or otherwise unlawfully dealing with the goods. [ERLE, J. The license was lawfully in the defendant's possession at the time he defaced it.] Assuming that the form of action is well conceived, the declaration should, at all events, have alleged that the act complained of was done *maliciously*. Proof that the license was defaced by *accident* or by *negligence*, would support this declaration.

TINDAL, C. J. Suppose the defendant had so blotted and blurred the document as to render the signature of the registrar invisible, and the license had become wholly useless, would the plaintiff have had no remedy? The allegation is, that the license was defaced *wrongfully* and unjustly, and the jury, by their verdict, affirm that the act was so done. It was not necessary to aver that it was maliciously done.

MAULE, J. It would be very hard indeed if the plaintiff were without remedy for such an injury as this, even in the absence of malice on the part of the defendant; and, if the plaintiff has any remedy,—and I am clearly of opinion that he has,—it is by an action upon the case, and not in trespass.

The rest of the court concurred.

Rule refused.

*300] *TEMPEST and Another v. KILNER. Nov. 21.

In assumpsit for the non-delivery of railway shares, pursuant to a contract, the declaration alleged that "the plaintiffs had always, from the time of making the agreement, been ready and willing to accept the transfer of the shares," and that, "although the plaintiffs, after the lapse of a reasonable time for the transfer, requested the defendant to transfer the shares, and tendered and offered to pay for the same," &c., the defendant did not transfer, &c. The defendant pleaded that the plaintiffs were not *always from the time of the making of the agreement* ready and willing to accept the transfer, &c.

Held, on special demurrer, that the traverse was too large, the allegation of time in the declaration being divisible.

A contract for the sale of railway shares may be the subject of an action at law.

ASSUMPSIT. The declaration stated, that, on the 18th of July, 1844, the plaintiffs, at the request of the defendant, bargained and agreed to buy of the defendant, and the defendant then bargained and agreed to sell to the plaintiffs, a certain interest or share of him the defendant in a certain company or partnership undertaking for constructing a railway from the parish of Ashton-under-Lyne, near Manchester, in the county of Lancaster, to the parish of Kirkheaton, near Huddersfield, in the county of York, to wit, one hundred shares in the said company or partnership undertaking, at a certain price in that behalf, to wit, 15s. premium for each and every share, that is to say, 15s. for each and every share in addition to such sum or sums as at the time of the transfer by the defendant to the plaintiffs should have been paid to the said company or partnership in respect of the said shares and each of them; that, on, &c., last aforesaid, in consideration thereof, and that the plaintiffs, at the request of the defendant, then promised the defendant to accept *within a reasonable time* a transfer of the said interest or shares, and to pay for the same at the rate or price aforesaid, the defendant then promised the plaintiffs *within a reasonable time* to transfer the said interest or shares to them, the plaintiffs; that, although a reasonable time for the said transfer of the said interest or shares had long elapsed before the commencement of the suit, and the *defendant, long before the commencement of the [301 suit, and after a reasonable time from the making of the said agreement and promise had elapsed, could and might and ought to have transferred the same to the plaintiffs, upon payment of the price thereof, after the rate aforesaid; and although the plaintiffs had always, from the said time of making of the said agreement and promise, been ready and willing to accept the transfer of the said interest and shares of him the defendant, and to pay for the same at and after the rate in that behalf aforesaid, whereof the defendant, during all the time aforesaid, had notice; and although the plaintiffs, after the lapse of a reasonable time for the transfer of the said interest or shares of the defendant, to wit, on the 1st of November, 1844, requested the defendant to transfer the said interest or shares to them the plaintiffs, and then tendered and offered to pay for the same at and after the rate in that behalf aforesaid: yet the defendant did not nor would, when so requested as aforesaid, transfer, and had not up to that time transferred, to the plaintiffs the said interest or shares of him the defendant in the said company or partnership undertaking, but had neglected and refused so to do; and that, by reason thereof, the plaintiffs had lost divers great gains and profits which might and otherwise would have accrued to them from the transfer of the said interest or shares to them as aforesaid, &c.

Plea, that the plaintiffs were not always, from the time of the making

of the said agreement and promise in the declaration mentioned, ready and willing to accept the transfer of the said interest and shares of him the defendant, and to pay for the same at and after the rate in the declaration in that behalf mentioned, *modo et formâ*—concluding to the country.

Special demurrer, assigning for causes, that the plea neither confesses
 *302] and avoids the matters contained in the declaration, nor takes issue upon any allegation which is material and decisive as to the right of action of the plaintiffs; that the traverse taken by the plea is too large, by reason that it was the duty of the plaintiffs, according to the terms of the promise stated in the declaration, to be ready and willing to accept and pay for the said transfer of the said share or interest only within a reasonable time, and not at all times from the making of the contract until the commencement of the action—nevertheless the defendant has tendered such an issue, that, if it appeared at the trial that the plaintiffs were not ready and willing at any time whatever from the making of the contract until the commencement of the action, the issue must be found for the defendant; that the allegation upon which issue is tendered by the second plea, is wholly immaterial to the cause of action stated in the declaration, &c.

Joinder in demurrer.

*303] *Byles*, Serjt., in support of the demurrer.(a) The plea is bad. Where an allegation containing matter that is immaterial, as well as matter that is material, is divisible, the defendant cannot put the whole in issue, but must traverse so much of it only as is material.

(a) The points marked for argument on the part of the plaintiffs were these:—"The plaintiffs will contend that the traverse taken by the second plea is too large: the contract being to deliver the shares within a reasonable time, it was the plaintiffs' duty to be ready and willing to accept them within that time and no longer; but, as the issue stands, if the defendant offered and the plaintiffs refused the shares at any time, however long, after the contract was open, (and the declaration alleges that a reasonable time had elapsed long before the commencement of the suit,) the defendant would succeed upon the issue: see *Basan v. Arnold*, 6 M. & W. 569. That it is clearly no justification for the defendant having taken too large a traverse, that the allegation in the declaration is too large also, where the allegation relates to an interval of time, which is divisible; where an allegation relates to an estate in land, or other matter, which is not divisible, it is otherwise, and may be traversed as laid."

For the defendant, as follows:—"The defendant will contend, that, inasmuch as the averment of readiness and willingness in the declaration is an indivisible averment, and, in part at least, material, he is justified in traversing such averment in the terms thereof, although such terms may be larger than necessary. He will also contend that the material part of the averment is only put in issue.

"The defendant will also object to the declaration, on the ground that the promise declared on is not supported by the consideration; and that the promise ought to have been laid on a promise to transfer the shares to the plaintiffs within a reasonable time, and on payment at the price previously mentioned, and not as it now stands, 'within a reasonable time' merely.

"The defendant will also object to the alleged request of a transfer, and offer to pay for the same, contained in the declaration, as being of any avail, on the ground that such request and offer are stated to have occurred after the lapse of a reasonable time for the transfer, and not within or at such reasonable time.

"The defendant will also object that the interest or shares mentioned in the declaration are not the subject-matter of legal sale or transfer; and that it is not alleged that the defendant could, within the reasonable time, have transferred them."

In Com. Dig. Pleader, (G. 15,) it is said, that "a traverse larger than can be denied (a) is bad : as, in intrusion, if it be alleged that possession of the college of the dean and canons of E. founded *apud* Westminster by dissolution, &c., came to the king, and the defendant intruded, &c., the defendant says that the foundation was by another name, *absque hoc* that it was founded *apud* Westminster by the name alleged, it is a bad traverse ; because it extends to the place of the foundation. So, a traverse of the surrender of a copyhold to such a steward such a day, is bad ; for, the day and the steward ought not to be part of the issue, but the traverse ought to be of the surrender *modo et formâ*. So, in an action on the case for stopping three lights, traverse *that he stopped the said three lights*, is bad ; for, if he stopped any of them, the action lies. So, in an action on the case for his wages *ab ultimo Dec. usque 1 Nov.*, it is bad to traverse "the service *ab ultimo Dec. ad 1 Nov.*, for, if he served any part of the time, he ought to have his wages for such time." [*304

"So, (b) a traverse narrower than it ought to be is bad. But, if a traverse be narrower than it ought, and this tends only to the disadvantage of the defendant, or of him who takes it, it is good ; as, in trespass, if the defendant justifies by a precept out of an inferior court, and traverses all times before the delivery, and after the return of the precept ; yet it is good, though he might have traversed before the *teste* ; for, this is to the defendant's disadvantage. So, a man, by a precise allegation of an estate, may give an advantage of traversing it precisely, though such particular estate is not necessary ; as, if A. alleges that he, being seised in fee, put his cattle into the close, the defendant may traverse the seisin in fee ; though any estate for life, or years, at will, or license of the owner, would enable him to put his cattle there." In Stephen on Pleading, 3d edit. 244 ; 4th edit. 286, it is said : "As a traverse must not be taken on an immaterial allegation, so, when applied to an allegation that is material, it ought in general to take in no more and no less of that allegation than is material. If it involves *more*, the traverse is said to be too large ; if *less*, too narrow. A traverse may be too large by involving in the issue, quantity, time, place, or other circumstances, which, though forming part of the allegation traversed, are immaterial to the merits of the cause." In *Basan v. Arnold*, 6 M. & W. 559, to an action on a bill of exchange, by the endorsee against the acceptor, the defendant pleaded, that, after the endorsement, and before the commencement of the suit, the plaintiff endorsed and delivered the bill to a person whose name is to the defendant unknown, and the defendant then "became, and [*305 still is, liable to pay the amount to the said person to whom it was so endorsed, and who from the time of that endorsement hitherto has been and is the holder thereof: the plaintiff replied, that, at the time of the commencement of this suit, the plaintiff was, and still is, the holder of the said bill ; without this, that any other person is the holder thereof,

(a) Q. d. embracing more than can be properly denied.

(b) Title Pleader. (G. 16.)

in manner and form as in the plea is alleged: and it was held that this replication was bad, as the traverse was too large, and put in issue the plaintiff's being the holder of the bill, not only at the time of the commencement of the suit, but also at the time of the plea pleaded, which was immaterial. In *Thurman v. Wild*, 11 Ad. & E. 453; 3 P. & D. 289, in trespass *quare clausum fregit*, the defendants pleaded that they acted as servants of B., that they delivered up possession of the close to him, and that he afterwards, with the consent of the defendants, made satisfaction to the plaintiff, which was accepted; and it was held, that, whether or not satisfaction from a stranger could be pleaded, it appeared from the plea that B. was a co-trespasser, so as to be able to make a satisfaction which should enure to the benefit of the defendants; and that, therefore, the averment of their consent to his so making satisfaction was immaterial, and that a replication which tendered issue upon such consent, was bad on special demurrer. The main objection to the declaration is, that the request of a transfer, and the offer to pay for the shares, are averred to have been made after the lapse of a reasonable time for the transfer. That allegation, however, is immaterial: the earlier part of the declaration contains an averment of readiness and willingness on the plaintiffs' part to accept and pay for the shares—an averment which overrides the whole declaration. Such an allegation is sufficient, without *306] going on to allege a tender or offer: *Rawson v. Johnson*, 1 East, 203; *Jackson v. Allaway*, 6 M. & G. 942, 7 Scott, N. R. 875; *Boyd v. Lett*, ante, vol. I. p. 222; 2 D. & L. 847. In *Jackson v. Allaway*, as here, there was the double averment in the declaration, that the plaintiff was ready and willing, and that he *tendered and offered*, to sell and deliver the goods contracted for; and a plea that the plaintiff did not tender or offer to sell or deliver, was held bad, as being a traverse of an immaterial allegation. And COLTMAN, J., said: "If the allegation in question were struck out of the declaration, there would still remain sufficient to maintain the action, as the allegation of the plaintiff's readiness and willingness to perform the contract, with notice to the defendants, would be enough for that purpose. This shows that the allegation as to the tender is immaterial, and that issue cannot be taken upon it." The allegation being divisible, the defendant was bound to divide it, and to traverse so much of it only as was material.

Manning, Serjt., contra. Much confusion arises in these cases from the improper use of the word "material." The true distinction is, between immaterial and impertinent averments. "It is easy," says Lord MANSFIELD, in *Bristow v. Wright*, 2 Dougl. 664, "for a party to state his ground of action. If it is founded on a deed, he needs not set forth more than that part which is necessary to entitle him to recover. If he states what is *impertinent*, it is an injury to the other party, and may be struck out, and costs allowed, upon motion. The distinction is, between that which may be rejected as surplusage, (which might have been struck

out on motion,) and what cannot. Where the declaration contains impertinent matter, foreign to the cause, and which the master, on a reference to him, would strike out (irrelevant covenants, for *instance,) *that* will be rejected by the court, and need not be proved. But, [*307 if the very ground of the action is misstated, as, where you undertake to recite that part of a deed on which the action is founded, and it is misrecited, that will be fatal: for, then the case declared on is different from that which is proved; and you must recover *secundum allegata et probata*." And, amongst other cases, his lordship refers to *Savage v. Smith*, 2 W. Blac. 1101, and says: "That was an action of debt against a sheriff's officer, by an informer. The declaration stated a judgment, and a *feri facias* upon that judgment. The *feri facias* was given in evidence, but not the judgment; and the court held, that, though it might be unnecessary to aver the judgment, yet, having been averred, it ought to have been proved: and my Lord Chief Justice DE GREY expressly went upon the distinction between *immaterial* and *impertinent* averments, and said that the former must be proved, because relative to the point in question." Here, the allegation is entire; no part of it could be struck out without avoiding the whole. The defendant has a reasonable time within which to make the transfer. The allegation, being indivisible, is properly traversed in its terms. Then, the declaration contemplates a reasonable time for the transfer, and a reasonable time for the acceptance of the shares: and, as the act of transfer by the defendant is to be accompanied by a corresponding act of the plaintiffs, it is necessary that the defendant should have notice of the plaintiffs' readiness to accept the shares. [MAULE, J. Must the plaintiffs be continually asking for a transfer? ERLE, J. Is not the allegation of notice of readiness enough?] The main objection, however, is, that railway shares, being an interest in a partnership, a mere *chose in action*, are not the subject-matter of a legal sale *or transfer. [MAULE, J. A *chose in action* cannot be transferred so as to enable the transferee to sue at law; but there is [*308 no illegality in the transfer. The law takes notice of these shares as being things of value. Suppose a man contracts to assign to another an equitable interest in land; could not the latter maintain an action upon that contract? Would it be any answer to say that the subject-matter of it was a mere equitable interest, a *chose in action*? TINDAL, C. J. These shares are the very things the plaintiffs intended to purchase, and the defendant to sell. How can it lie in his mouth to say that they are not saleable, there being nothing illegal in the transaction?]

Byles, Serjt., in reply, was stopped by the court.

TINDAL, C. J. The allegation in the declaration, that the plaintiffs had always from the time of making the agreement and promise been ready and willing to accept the transfer, is to be taken with such reservation as the law imposes, viz., during such time as from the nature of the contract might be inferred to be reasonable. The allegation of time being divisi-

ble, the defendant should have divided it in his plea. I think the declaration is sufficient, and the plea insufficient, and therefore that the plaintiffs are entitled to judgment.

COLTMAN and ERLE, Js., concurred.

MAULE, J. I also think the declaration sufficient, for the reasons already suggested. The plea is clearly bad. The allegation of time is divisible; and the defendant has traversed that which clearly was immaterial.

Judgment for the plaintiffs.(a)

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*GILLON v. DEARE. Nov. 21.

To a declaration by an endorsee against the acceptor of a bill, the latter pleaded that, not being a trader within the bankrupt laws, and having resided twelve calendar months within the Birmingham district, he, after the bill became due, and before the commencement of the suit, duly petitioned the district court of bankruptcy for protection from process, under the 5 & 6 Vict. c. 116; that such proceedings were had upon the said petition, that a final order was made by a commissioner duly authorized, for the protection of the person of the defendant from process, and for the vesting of his estate and effects in an official assignee; and that no assignee was chosen by the creditors of the defendant, or by any of them; whereby, and by force of the said order, the defendant was discharged from the bill and cause of action in the declaration mentioned—verification.

Held, on special demurrer, that this was not a good plea under the fourth section of the statute, inasmuch as it did not aver all the facts necessary to show the requisites of that section to have been complied with; nor (*dissentiente*, Erle, J., and *dubitante*, Maule, J.) within the tenth section, the form prescribed by that section not having been strictly followed.

Held, also, that the plea properly concluded with a verification.

Semble, per Maule, J., that the adoption of the short form of plea given by the tenth section is not imperatively required.

ASSUMPSIT by the endorsee against the acceptor of a bill of exchange.

Plea, that, after the acceptance of the bill of exchange in the declaration mentioned, and after the same had become due and payable, and before the commencement of the suit, to wit, on, &c., the defendant, not being a trader within the meaning of the statutes in force relating to bankrupts at the time of making and passing the act of parliament thereafter mentioned, and having resided twelve calendar months within the district of Birmingham, under and by virtue of, and according to the directions and provisions of, a certain statute made and passed in the sixth year of the reign of our lady the now queen, intituled, "An act for the relief of insolvent debtors,"(b) duly presented his petition for protection from process, to the court of bankruptcy for the Birmingham district, at Birmingham, in the county of Warwick; and that such petition was forthwith
 *310] afterwards, *to wit, on the day and year aforesaid, filed of record in the said court; that such proceedings were had in the said district court of bankruptcy, upon the said petition of the defendant; that, afterwards, and before the commencement of the suit, to wit, on, &c., a final order was made by R. D., Esq., one of the commissioners of the

(a) Vide *Pim v. Grazebrook* post, p. 429.

(b) 5 & 6 Vict. c. 116.

said district court of bankruptcy duly authorized in that behalf, for the protection of the person of the defendant from process, and for the vesting of the estate and effects of the defendant, in T. B., one of the official assignees of the said district court of bankruptcy; that no assignee was appointed by the creditors of the defendant, or by any of them; and that thereby, and by force and virtue of the said order, the defendant was discharged of and from the bill of exchange and cause of action in the declaration mentioned; and that the said order and discharge still remained in full force—verification.

Special demurrer, assigning for causes, amongst others, that the plea ought to have stated what the proceedings were which were had upon the said petition, and have shown that they were such as were authorized by the statute, and as entitled the commissioner to make the final order; that the plea, if intended for a general plea given by the statute, was not sufficient, inasmuch as it did not state or show that the petition so presented was such a petition, or that it had annexed to it such schedule, as the statute required, nor did it follow the language of the statute in that behalf; and that it did not conclude to the country.

Joinder in demurrer.

Talfourd, Serjt., (with whom was *Lush*,) in support of the demurrer. The plea is clearly bad for not pursuing strictly the form prescribed by the tenth section of *the 5 & 6 Vict. c. 116.(a) The question whether [311 that clause gives a general form of plea, as was given by the 6 G. 4, c. 16, s. 126, has been discussed in the court of Exchequer, and also in this court. In *Leaf v. Robson*, 13 M. & W. 651, the defendant pleaded, that, in pursuance of the statute 5 & 6 Vict. c. 116, she presented her petition to the Leeds district court of bankruptcy, in which district she had resided for twelve calendar months previously, praying to be protected from all process against her person and property, and that she might have such further relief as by the said statute was provided, and as the said court should think fit; that such proceedings were thereupon had, that afterwards, to wit, on, &c., an order was made by M. B., the commissioner of bankrupts for the Leeds district, for the protection of the person of the defendant from all process against her person and property, and for the vesting of her estate and effects in C. F., the official assignee named by the said commissioner; whereby, and by force of the premises, and of the said statute, the defendant was then discharged of and from the premises and causes of action in the declaration mentioned; and that the said order and discharge still remained in force: and the court of Exchequer held that this was not a good plea under the tenth section, because it did not strictly follow its words, or under the fourth section, be-

(a) Which enacts, "that, if any action or suit is brought against any petitioner for or in respect of any debt contracted before the date of filing his petition, it shall be a sufficient plea in bar of the said action or suit, that such petition was duly presented, and a final order for protection and distribution made by a commissioner duly authorized, whereof the production of the order, signed by the commissioner, with proof of his handwriting, shall be sufficient evidence."

cause it did not show all the requisites of that section to have been complied with. But, in *Cook v. Henson*, ante, Vol. I. p. 908, where to an action by an endorsee against the acceptor of a bill, the latter pleaded, *312] *that, before the commencement of the suit, a petition for his protection from process was duly, and according to the statute, presented by him to the court of bankruptcy; that afterwards and before action brought, a final order for protection *and distribution* was made in the matter of the petition, by J. E., a commissioner of the said court duly authorized in that behalf, and that the causes of action in the declaration were contracted before the date of the filing the petition—this court held the plea sufficient within the 5 & 6 Vict. c. 116, s. 10. Here, the plea does not follow the words of the tenth section. It does not allege that a final order was made for protection *and distribution*; neither does it show that any of the requisites of the earlier sections have been complied with.

In *Nicholls v. Payne*, 7 M. & G. 927, 8 Scott, N. R. 732, this court inclined to think a plea under this statute, which omitted to aver that the order was a final order for *distribution* as well as for protection of the defendant's person and property, was insufficient.(a) [MAULE, J. The statute clearly meant to prevent the plaintiff from contesting at the trial all the preliminary proceedings before the commissioner. This is evident from s. 12, which enables any creditor who is dissatisfied, to apply to the commissioner to rescind his order. Taking the fourth(b) and the twelfth sections together, the commissioner has power to make an order for protection and distribution; which, though in some *sense final, may *313] be rescinded as to the protection, upon a proper application to the commissioner's discretion. When, therefore, a defendant sets up the final order as a bar to an action, the proper course for the plaintiff to take, if he wishes to contest the order, is, to apply to the commissioner under s. 12. If the validity of the order were allowed to be contested at the trial, it might enure as a good order as to one creditor, and not as to another.] In *Cook v. Henson*, TINDAL, C. J., says: "It appears to us that the tenth section of the 5 & 6 Vict. c. 116, does give the right to plead generally, in the manner adopted by the defendant in this case. Power is given to the commissioner, in the earlier sections of the act, to inquire into the matters of the petition, and adjudicate upon them, and make a final order for protection and distribution if he think fit to do so; and it seems to us that it was the intention of the legislature to make his decision final, and not capable of being controverted in an action; especially as by the twelfth section any creditor or assignee is enabled to petition the com-

(a) See *Toomer v. Ginge'l*, post, Trinity term, 1846, Vol. III.

(b) The fourth section details the mode of examination before the commissioner, preparatory to the second order, and directs "that such order shall be called a final order, and shall be for the protection of the person of the petitioner from all process, and for the vesting of his estate and effects in an official assignee, to be named by such commissioner, together with an assignee to be chosen by the majority, in number and value, of the creditors who may attend before the commissioner on such day," &c.

missioner to rescind his final order, so far as relates to the protection of the petitioner's person from process, and so far as relates to the effect of such order in bar of suits and actions. If, then, the decision of the commissioner as to the matters authorizing the making of a final order, is not to be controverted, there can be no good reason for requiring the plea to set forth all the facts necessary to give him jurisdiction, and it is reasonable to allow, under the section in question, the same form of plea as is given, in somewhat more express terms, by the bankrupt act, 6 G. 4, c. 16, s. 126." (a) If, then, this is a sufficient plea under the [*314 *tenth section of the 5 & 6 Vict. c. 116, and is analogous to the general plea of bankruptcy under the 6 G. 4, c. 16, it ought to have concluded to the country: *Miles v. Williams*, 10 Mod. 160; 1 P. Wms. 249; (b) *Wilson v. Kemp*, 2 M. & Sel. 549; *Sheen v. Garrett*, 6 Bingh. 686; 4 M. & P. 525.

Channell, Serjt., contra. All that the statute 5 & 6 Vict. c. 116, requires, is, that there shall be a final order made, vesting the property of the insolvent in some person upon whom the law casts the duty of distribution. The choice of an assignee by the creditors is a mere protection given to them by the statute, not a condition precedent. Nor is it necessary, in order to constitute a good plea in bar under sect. 10, that the precise words of that section should be adopted in the plea: all that is required is, that it should be shown that there has been a *final* order, and not merely an *interim* order for protection; and that is sufficiently shown in this plea.

As to the conclusion of the plea—it may be conceded that the conclusion of a general plea of bankruptcy must be to the country: but it must be observed that the terms of the tenth section of the 5 & 6 Vict. c. 116, differ materially from those of the 126th section of the 6 G. 4, c. 16, the language of which is usually employed in speaking of what may be given in evidence under the general issue.

Talfourd, Serjt., in reply. To be a good plea under the statute, it must follow the precise words of the tenth section; and it must conclude to the country, or it must set out the various steps taken in order to show that the requisitions of the act have in all respects been duly complied with.

*TINDAL, C. J. It appears to me that this plea is bad, upon a special demurrer pointing out for cause that the form virtually [*315 prescribed by the tenth section of the 5 & 6 Vict. c. 116, has not been complied with. It is clear that this is not a plea under the fourth section; for, in that case, it must have set out all the facts necessary to bring the

(a) Which enacts that the bankrupt, having obtained his certificate, "may plead, in general, that the cause of action accrued before he became bankrupt, and may give this act and the special matter in evidence; and such bankrupt's certificate, and the allowance thereof, shall be sufficient evidence of the trading, bankruptcy, commission, and other proceedings precedent to the obtaining such certificate."

(b) See the stat. 4 Ann. c. 4, s. 8.

case within that clause. If, then, it is not a plea under the fourth section, it must be taken to have been pleaded with reference to the provisions of the tenth section. Now, that section enacts, "that, if any action or suit is brought against any petitioner for or in respect of any debt contracted before the date of filing his petition, it shall be a sufficient plea in bar of the said action or suit, that such petition was duly presented, and a final order for protection and distribution made by a commissioner duly authorized," &c. All that this plea states is, that, after the bill became due, the defendant duly presented his petition for protection from process, to the Birmingham district court of bankruptcy, that such proceedings were had thereupon, that, before the commencement of the suit, a final order was made for the protection of the person of the defendant from process, and for the vesting of his estate and effects in the official assignee, and that no assignee was appointed by the creditors. It seems to me that a party ought not to be at liberty to avail himself of the short form of plea given by section 10, unless he is prepared to take it for better or for worse. It may be said, that, as the statute vests the estate in the assignees for the purpose of distribution amongst the creditors, the order is, in effect, an order for distribution as well as for protection. That may be so. But here we are dealing with a precise objection, pointed out on special demurrer, that the defendant has not followed the form prescribed by the statute. I therefore think the plaintiff is entitled to judgment.

*316] *COLTMAN, J. I am of the same opinion. Enough is not alleged here to make this a good plea independently of the tenth section. I am not prepared to say that the plea might not have been made good by proper averments showing that all the requisites of the statute had been duly complied with: but that has not been done. It is not shown that there has been a good final order. I do not think the plea is even a *substantial* compliance with section 10. A plea under that section ought to follow the very words of the statute.

MAULE, J. I entertain some doubt in this case, and would willingly have taken more time to consider it. Certainly the language of section 10 is not followed; and it may be doubted whether the words in the plea, "for the protection of the person of the defendant from process, and for the vesting of the estate and effects of the defendant in T. B., one of the official assignees," &c., though the very words found in section 4, sufficiently show this to be a plea under that section. If it were so, it would by no means be necessary to follow the words of the tenth section: if the plea showed the order to be an order for distribution, as well as for protection, it would suffice; but I doubt whether it does show that with sufficient certainty. If the order had been set out in terms, the court could have seen whether or not it was such an order as contemplated by sect. 4. Although, therefore, I still entertain a good deal of doubt, I concur with my Lord Chief Justice and my brother COLTMAN that the plaintiff must have judgment.

As to the conclusion, I think the plea is well enough concluded with a verification. Under the bankrupt act, the plea is, by the express words of sect. 126, a general plea—a sort of general issue, to the exclusion of any other defence than such as may arise out of the defendant's bankruptcy and certificate. Bankruptcy *might have been made a thing to be given in evidence under the general issue: but, though the 6 G. 4, c. 16, did not go so far as that, it put the parties in precisely the same situation as if bankruptcy were shown under the general issue. The tenth section of the 5 & 6 Vict. c. 116, does not say—as the 126th section of the 6 G. 4, c. 16, does—that the party may plead *in general* that a petition was presented, and a final order made thereon, but that “it shall be a sufficient plea in bar of the said action or suit, that such petition was duly presented, and a final order for protection and distribution made by a commissioner duly authorized,” &c. The plea, therefore, is not within the reason of the analogous case of a plea of bankruptcy. [*317]

ERLE, J. It is with extreme hesitation and regret that, in this case, I differ from the rest of the court. It appears to me that the statute 5 & 6 Vict. c. 116, was passed for the relief of honest insolvent debtors, by enabling them, upon giving up all their property for the benefit of their creditors, to obtain from the commissioner a final order for protection from process; and by furnishing them with a short defence, if subsequently sued for debts due at the time of filing their petitions. The tenth section prescribes the requisites of the plea. It gives no form: but it contains a general description of the two main points to be noticed in the plea—first, that a petition for protection was duly presented—secondly, that a final order for protection and distribution was made by a commissioner duly authorized. And that is the outline and substance of the plea here pleaded. Three objections are made to this plea. The first is, that it is improperly concluded with a verification. But, according to the general rules of pleading, wherever new matter is introduced into a plea, it must *conclude with a verification. (a) The general plea of bankruptcy is anomalous: the reason of it does not extend to the present case. [*318]

The second objection is, that the statute contemplated an order vesting the estate and effects of the insolvent in an official assignee to be named by the commissioner jointly with an assignee to be chosen by the creditors, and that the defendant is deprived of the benefit of the order because it vests the estate in the official assignee only. It appears to me that the plea is good in that respect. The course pointed out by the statute is this: The insolvent is to apply by petition to the commissioner to be protected from process. The commissioner is to appoint a day for the insolvent to be examined, and, if satisfied, he is to cause notice to be

(a) Where new matter is introduced, the pleading must not conclude to the country; and, if the new matter be *affirmative* matter, the pleading must conclude with a verification.

given, that, on a certain day, he will proceed to make a final order, unless cause be shown to the contrary; which order (by sect. 4) "shall be for the protection of the person of the petitioner from all process, and for the vesting of his estate and effects in an official assignee, to be named by such commissioner, together with an assignee to be chosen by the majority in number and value of the creditors who may attend before the commissioner," &c. This provision as to the appointment of a second assignee, is a provision for the benefit of the creditors, if they choose to avail themselves of it. But, if they do not choose to attend for the purpose of appointing an assignee of their own body, the insolvent ought not to be deprived of the benefit of the adjudication made for his protection. I cannot help thinking, therefore, that the plea is sufficient, notwithstanding this objection.

The third objection—and this is the point upon which I have paused
 *319] the longest, and upon which I regret to be obliged to differ from the rest of the court—is, that the pleader has not exactly followed the words of the tenth section. But to my mind he has taken a more accurate definition of the order therein mentioned, which evidently refers to the final order spoken of in sect. 4. Now, the order mentioned in sect. 4 is "for the protection of the person of the petitioner from all process, and for the vesting of his estate and effects in an official assignee," &c.; not a word being said in that section, or in the order, about distribution. The order vesting the estate and effects in the assignees, whose duty it is to distribute, is, by force of law, an order for distribution. The statute not having given a form of plea, but merely describing the two main ingredients which the plea shall contain, viz., the petition and the vesting order, the pleader has more accurately described the order as an order for the protection of the person of the defendant from process, and for the vesting of his estate and effects in the assignee—relying upon the known rule of pleading, which allows an instrument to be set out according to its legal effect. (a) I therefore think the plea is sufficient. But, as the majority of the court think otherwise, the plaintiff must have judgment.
 Judgment for the plaintiff.

Channell, Serjt., on the ground of the difference of opinion upon the bench, prayed and obtained leave to amend, on the usual terms.

Rule accordingly.

(a) Vide *Pim v. Grazebrook*, post, 429, 439.

*NEALE v. SNOULTEN. Nov. 22.

[*320]

An affidavit of debt stating that the defendant is indebted to the plaintiff in a certain sum on a bill of exchange for such an amount, and for money lent, interest, &c., without showing that the interest is payable under a contract, is not sufficient.

A writ of summons having issued against the defendant in this cause, an order for his arrest on a *capias* under the 1 & 2 Vict. c. 110, s. 3, was obtained upon an affidavit, stating that the defendant, a mariner, was "justly and truly indebted to the deponent (the plaintiff) in the sum of 105*l.* 8*s.* 4*d.*, on a bill of exchange drawn by the deponent upon and accepted by the defendant, for the payment of 80*l.* to the deponent at a day now past, and also for money lent to, and paid, laid out, and expended, for the defendant, at his request, and for interest upon and for the forbearance to the defendant by the deponent at the defendant's request, of moneys due and owing from the defendant to the deponent," and that the defendant had informed the plaintiff he was about to quit England. The defendant having been arrested upon this affidavit,

Dowling, Serjt., on a former day in this term, obtained a rule nisi to discharge the order, on the ground that the affidavit did not disclose a debt for which the defendant could properly be held to bail.

Channell, Serjt., showed cause. A party may lawfully be arrested for interest payable according to a contract. The question therefore will be, whether this affidavit does not sufficiently show that the interest was payable under a contract. [MAULE, J. The statement is such that it comprehends every way in which interest may be payable; and, if so, it comprehends interest not due under a contract.] The authorities are not quite *consistent; but they will warrant the court in referring the interest in this case to a contract. In *Pickman v. Collis*, 3 Dowl. [*321]

P. C. 429, 1 Gale, 47, an affidavit of debt for 500*l.*, for money lent and interest thereon, and on an account stated, without alleging a contract for interest, was held sufficient. And PARKE, B., said: "The interest must be due by contract; the plaintiff swears that it is due." [MAULE, J. That would heal objections that have prevailed in many cases: most affidavits contain the word "indebted."] In *White v. Sowerby*, 3 Dowl. P. C. 584, an affidavit of debt claiming interest was held sufficient, though it neither stated the amount of the principal, nor the time when the interest began to run.

MAULE, J. In *Callum v. Leeson*, 2 C. & M. 406, 2 Dowl. P. C. 381, 4 Tyrwh. 266, an affidavit of debt, for "money lent and advanced, and interest thereon," was held bad. So in *Drake v. Harding*, 4 Dowl. P. C. 34, in an affidavit to hold to bail, it was stated that a sum was due for money lent and advanced, &c., and for money due and payable for inte-

rest upon, and for the forbearance of, divers sums of money due and payable, and by the plaintiff forborne at the request of the defendant; and it was held that the special contract to pay interest was not sufficiently stated. A party might swear that the defendant was indebted to him in 100*l.*, when 50*l.* only might be due for principal, and the rest be claimed as what the plaintiff *thought* he was justly entitled to recover in the shape of interest. That clearly would not do. I think this affidavit is insufficient.

TINDAL, C. J. Upon the whole, I think the affidavit in this case was insufficient to warrant the issuing of a *capias*. The current of authorities *322] shows, that, to *justify an arrest for interest, it must be stated to have become due *under a contract*. That is not so stated here. The rule must be made absolute, but without costs.

The rest of the court concurred.

Rule absolute accordingly.

Where the defendant is in custody under a writ of *capias* issued under the 1 & 2 Vict. c. 110, s. 3, in an action commenced by writ of summons, it is sufficient to file a declaration, and to serve the defendant with notice thereof.

Nov. 25. *Dowling*, Serjt., on a subsequent day, obtained a rule nisi to set aside the notice of a declaration, and subsequent proceedings, on the ground that, the defendant being a prisoner, he ought to have been served with a declaration, and that it was not enough to *file* a declaration and serve him with notice thereof.

Channell, Serjt., showed cause. The old practice, which required a declaration against a prisoner to be delivered, has no application to proceedings under the 1 & 2 Vict. c. 110. Formerly the declaration was the commencement of the action; (a) but now it is otherwise, and a prisoner in custody under a *capias* issued under the 1 & 2 Vict. c. 110, s. 3, stands in precisely the same situation as any other defendant, the proceeding under that statute being wholly collateral to, and independent of, the proceedings in the suit.

Dowling, Serjt., in support of the rule. The 1 & 2 Vict. c. 110, s. 3, has not altered the practice in this respect. Being in custody at the plaintiff's suit under the provisions of that act, the defendant is in precisely *323] *the same situation as if he had been a prisoner from the commencement. [TINDAL, C. J. The proceeding by *capias* under the statute is a mere collateral and auxiliary proceeding.] In *Ball v. Stanley*, 6 M. & W. 396, a judge at chambers, by consent of the parties in a cause, ordered, that, on payment of the debt and costs, the costs down, and the debt in six months, *all farther proceedings in the cause* should be stayed: the defendant paid the costs down in pursuance of the order; and it was held that the plaintiff could not, within the six months, obtain

(a) This was practically so in proceedings by bill, as the bill, of which the declaration was supposed to be a copy, was never filed. It was so, however, only at the option of the plaintiff, who might treat the issuing of process as the commencement of the action.

an order to arrest the defendant, under the 1 & 2 Vict. c. 110, s. 3. And ALDERSON, B., said: "My first impression was adverse to Mr. Williams, but he convinced me that this is a proceeding in the cause: it changes the nature of the cause from one commenced by a writ of summons to one founded on a writ of *capias*. Though not a necessary proceeding to accelerate or retard final judgment, it is yet a proceeding whereby the nature of the cause is changed." Upon principle, as well as upon the authority of that case, the rule should be made absolute.

TINDAL, C. J. No authority has been cited to show that, if, in the course of a cause commenced by writ of summons, an order for a *capias* is obtained under the 1 & 2 Vict. c. 110, s. 3, the proceedings are thereby in any degree altered. And I see nothing in principle to warrant the supposition that the obtaining this collateral order so alters the nature and course of the proceedings as to entitle the defendant to any thing that he would not have been entitled to if no *capias* had issued. I therefore think this rule must be discharged.

The rest of the court concurred.

Rule discharged.

*WALKER v. HUNTER and Others. Nov. 22. [*324

The sheriff having seized certain goods in the house of A., under a *fi. fa.* against him at the suit of B., and a claim having been made by C. under a bill of sale, B. not choosing to contest the claim so made by C., his attorneys gave the sheriff a direction to withdraw, in the following terms: "A. v. B. Withdraw under the *fi. fa.* herein, the goods having been claimed." The officer finding that the bill of sale under which C.'s claim was made did not convey the whole of the goods he had seized, retained possession of those to which the claim did not apply; and three days afterwards informed the attorneys for the execution-creditor what he had done. The attorneys, as well as the execution-creditor, expressed their approbation of the course the officer had adopted, the former observing that the direction to withdraw was only intended to apply to the goods that were the subject of the claim.

In trespass for entering the house and seizing and converting the goods, the sheriff justified entering under a writ. The plaintiff replied, admitting the writ and warrant, that after the seizure, A. discharged and forbade the defendants from further executing the writ, and new-assigned that he brought his action for the subsequent trespass and conversion. The defendants, in their rejoinder, traversed the discharge to the sheriff:—

Held, that, construing the direction to the sheriff to withdraw, with reference to the surrounding circumstances, it amounted to no more than a partial direction—to retire from the possession of the goods to which C.'s claim applied.

Held also, that the subsequent ratification by A. of the detention of the rest of the goods, being an act done for his benefit, was a sufficient justification to the sheriff.

Held also, that the issue was not divisible, and therefore that A. would not be entitled to recover, even though it should appear that some of the goods subsequently detained were within the claim.

THIS was an action of trespass against the defendants, Hunter and Sidney, sheriff of Middlesex, Thompson, their officer, and Furber, an auctioneer, for breaking and entering the plaintiff's dwelling-house, and continuing therein for a certain space of time, and seizing and converting his goods. The defendants severally pleaded not guilty, and justified,—the two first-named defendants as sheriff, and the others as acting under their authority, under a writ of *fi. fa.* issued at the suit of one Arthur Gur-

ney, against the now plaintiff, for 21*l.* 14*s.* 6*d.* out of the court of Exchequer.

The replication, by way of new assignment, to the pleas of justification, stated, that, after the said writ of **fi. fa.* had been so sued
 *325] out and delivered to the defendants, Hunter and Sidney, as alleged, and after the defendants Hunter and Sidney had so made their warrant, and the same had been so delivered to the defendant Thompson as alleged, and after the defendant Thompson, by virtue of the said writ and warrant, and the defendant Furber, as the servant of the defendant Thompson, and by his command, had entered into the said dwelling-house in the declaration mentioned, as in that plea alleged, and before the commencement of the suit, to wit, on the 7th of March, 1845, the said Arthur Gurney discharged and forbade the defendants Hunter, Sidney, Thompson and Furber, respectively, from then further executing the said writ, and the defendants Thompson and Furber, from then further executing the said warrant, in the said dwelling-house, or upon the said goods, or any part thereof, in the declaration respectively mentioned, and then ordered, directed, and required the several defendants respectively to withdraw from the said dwelling-house, and from the possession of the said goods respectively, and that thereof the several defendants respectively, then, and before the commencement of the suit, had due notice: that the plaintiff commenced his action, and declared as aforesaid, not for the trespasses in the plea mentioned, and therein attempted to be justified, but for that the defendants, after the said Arthur Gurney had so discharged the defendants respectively from then further executing the said writs, and the defendants Thompson and Furber, from then further executing the said warrant, in the said dwelling-house, or upon the said goods, or any part thereof, in the declaration mentioned respectively, and had ordered, directed, and required the several defendants respectively to withdraw from the said dwelling-house, and from the possession of the said goods respectively as aforesaid, and after the several defendants respectively had so had notice thereof as aforesaid, and be-
 *326] fore the *commencement of the suit, with force and arms, at the said time when, &c., stayed and continued in and upon the said dwelling-house for a long time, to wit, on and from the day in the declaration in that behalf mentioned for the space of six days then next following, and then continued in possession of the said goods, and then carried away the same and converted and disposed of the same to the defendants' own use, as the plaintiff had in his declaration complained against them; and that the trespasses above newly assigned were other and different trespasses from those in the plea mentioned, and therein attempted to be justified—verification.

In their rejoinder, the defendants Hunter and Sidney denied the alleged discharge by a special traverse; the other defendants, Thompson and Furber, pleaded not guilty, to the new assignment.

The cause was tried before EARLE, J., at the sittings at Westminster after

last Michaelmas term. It appeared, that, on the 6th of March, 1845, the defendant Thompson, assisted by Furber, entered the dwelling-house of the plaintiff, situate in Wellington Road, St. John's Wood, under a warrant granted by the sheriff of Middlesex upon a writ of *fi. fa.* at the suit of Gurney, and also under another warrant. On the following day, a notice was served, on behalf of a Mrs. Cluse, who claimed the greater portion of the goods seized, under a bill of sale, and took out a summons under the interpleader act; whereupon the sheriff was directed by Gurney to withdraw from possession. The direction to withdraw was as follows:—

“*Gurney v. Walker.*

“Withdraw under the *fi. fa.* herein; the goods having been claimed.

“C. & S., plaintiff's attorneys.

“*8th March, 1845.*”

“To the sheriff of Middlesex, and to Mr. Thompson, his officer.”

*At the time this direction was given, Culverhouse, the clerk [327 to Gurney's attorneys, who had the management of the business, was not aware that goods had been seized which were not covered by the bill of sale; and, when informed three days afterwards, that Thompson still retained a portion of the goods not included in the bill of sale, he approved of what he had done, saying that the order was never intended to apply to them. The execution-creditor himself also approved of what the officer had done. The sheriff ultimately returned that the goods remained in his hands for want of buyers.

On the part of the defendants, it was contended that the order to withdraw (which, being in writing, the learned judge thought must speak for itself) was a mere qualified order to withdraw from the possession of such of the goods as had been claimed.

On the part of the plaintiff, it was insisted that the issue upon the traverse to the new assignment being divisible, he was at all events entitled to succeed in respect of certain of the goods which were included in the claim, and not given up.

The learned judge was of opinion that the issue was not divisible: and he thought, that, under the circumstances, the order was a qualified order only, to withdraw from such of the goods as had been claimed. He thereupon directed a nonsuit, with leave to the plaintiff to move to enter a verdict, with 40s. damages, if the court should be of opinion that he was entitled to recover.

Channell, Serjt., on a former day in this term, obtained a rule nisi to enter a verdict for the plaintiff for 40s., or for a new trial, on the ground that the paper delivered to the sheriff's officer on the 8th of March, coupled with the other circumstances of the case, *amounted to [328 an absolute direction to the sheriff to withdraw from possession.

Barker v. St. Quintin, 12 M. & W. 441, was cited.

Channell and Shee, Serjts., (with whom were Pearson and Kennedy,)

showed cause. The complaint in the declaration is completely answered by the plea, justifying the breaking and entering under the *fi. fa.* The plaintiff, by his replication, seeks to get rid of that justification by showing a direction from the execution-creditor to the sheriff to withdraw from the seizure made; thus setting up an *entire* answer to the plea. The issue joined upon that replication, therefore, clearly is not divisible. The subsequent words, which proceed upon the assumption that the direction to withdraw was an absolute and unqualified direction, do not make it a new assignment. The only question therefore is, whether the paper delivered to Thompson on the 8th of March was a general authority to withdraw from the seizure altogether, or only a limited direction to abandon the seizure as to those goods to which Mrs. Cluse's claim applied, Gurney's attorneys not thinking proper to contest the matter with the claimant. The parol evidence, if admissible, clearly shows that all the parties understood the direction only to apply to such of the goods as were covered by the bill of sale.

Talfourd, Serjt., (with whom was *H. Hill*.) in support of the rule. There is nothing in the evidence to warrant the inference that the direction to the sheriff to withdraw was meant to apply only to a portion of the goods that had been seized. At the time it was given, neither the execution-creditor nor his attorneys were aware that any portion of the *329 goods seized was not *included in the claim. [MAULE, J. Was it not competent to the execution-creditor to revoke the authority to withdraw, or afterwards to ratify what the officer had done? If so, what right has the plaintiff to complain?] The sheriff having seized, and having received a direction from the execution-creditor to withdraw, the power of the writ was spent, and the sheriff became a trespasser by remaining in possession. [MAULE, J. The execution-creditor did not part with his rights to the judgment-debtor by communicating to the sheriff his intention to abstain from contesting the claim under the interpleader summons.] In *Barker v. St. Quintin*, to trespass for false imprisonment, the defendant, by his plea, justified the trespass under a writ of *ca. sa.* directed to him as sheriff, and sued out by one Finn, on a judgment in the Queen's Bench; the plaintiff replied, that, before the writ was delivered or executed, Finn released the debt, "and gave notice to the defendant of the release, and thereby discharged and forbade the defendant from executing this writ:" and it was held, that, after a direction to the sheriff not to execute the writ, the sheriff doing so became a trespasser. PARKE, B., there says: "The case which has been cited from *Bulstrode and Cro. Jac.* (a) is an express authority to show, that, if a plaintiff in an action gives directions to the sheriff to discharge the defendant, the sheriff is a trespasser if, after that, he detains the defendant. In that case Lord COKE seems to have thought that the sheriff might have discharged himself by pleading a justification under a judgment of the

(a) *Withers v. Henley*, *Cro. Jac.* 379; 3 *Bulstr.* 96.

court, founded on the statute of Richard 2, by which the defendant is not allowed to go at large until he has 'made gree' to the party; but that, if the defendant made an agreement with the plaintiff, it was the duty of the sheriff to discharge him, upon the mere *direction of the plaintiff himself. That case, then, is an authority precisely in [330 point; it seems to go the length of deciding, that, where a party is in execution, if the plaintiff thinks fit to discharge him, the sheriff is a trespasser if he afterwards detain him." So, here, when the sheriff and the officer received the direction from the execution-creditor to withdraw, the authority of the sheriff to detain the goods was at an end. [MAULE J. In *Barker v. St. Quintin*, the writ of *ca. sa.* was altogether withdrawn: here, the sheriff is merely directed to withdraw from the goods seized under the *fi. fa.* He clearly might have seized other goods belonging to the debtor.] The direction to withdraw is absolute and unqualified; the reason assigned is mere surplusage. It would have been a perfectly good protection to the sheriff if he had withdrawn altogether. At all events, the sheriff is liable in respect of that portion of the goods covered by the claim, as to which the order of the execution-creditor was disobeyed. The issue is clearly divisible.

TINDAL, C. J. It appears to me that the only question in this case is, whether the issue taken on the alleged discharge of the sheriff by Gurney, the execution-creditor, from the execution of the writ of *fi. fa.*, ought to be found for the plaintiff or for the defendants. The plaintiff brings his action against the defendants for breaking and entering his house, continuing therein for a certain space of time, and seizing and converting his goods. The defendants justify the breaking and entering the house and seizing the goods, under a *fi. fa.* issued upon a judgment obtained against the now plaintiff in an action at the suit of one Gurney. The plea goes to the whole cause of action; and there is no dispute as to the identity of the goods seized. The replication alleges, that, after the sheriff had seized under *the warrant, and before the commence- [331 ment of the suit, Gurney, the execution-creditor, discharged and forbade the defendants from further executing the writ and warrant in the said dwelling-house, or upon the said goods, or any of them, or any part thereof, in the declaration respectively mentioned, and then ordered, directed, and required the defendants to withdraw from the said dwelling-house, and from the possession of the said goods, respectively. The replication, therefore, is as wide as the plea: indeed, it would have been idle unless it had applied to all the goods mentioned in the declaration. The question is, whether, upon the evidence, there was a general order from the execution-creditor discharging the sheriff from the execution of the writ, or a partial discharge, only applying to that portion of the goods seized to which Mrs. Cluse's claim related. In order to sustain the issue on his part, the plaintiff put in the paper given by Gurney's attorneys to the officer whilst in possession. If the case had rested upon that paper

alone, I should have thought it a general discharge. It was headed in the cause, and was in these terms :—"Withdraw under the *fi. fa.* herein, the goods having been claimed." If nothing more had taken place, I should have inclined to consider it a complete direction to the sheriff to desist from the further execution of the writ. But the evidence does not rest there. Gurney, finding that the direction was too general in its terms, subsequently assented to its countermand. That seems to be the result of the evidence. The goods being seized under the writ, and a claim having been made as to some of the goods by Mrs. Cluse, which the attorneys for the execution-creditors did not think fit to contest, it is impossible to doubt that the real intention of the parties was, that the sheriff should withdraw only as to the goods that were covered by that claim. That would be the natural course. And it appears, that, whilst *332] the *officer was in, looking over the goods, Culverhouse, the clerk to Gurney's attorneys, came to him to inquire why he remained in possession; and, being informed that there were goods that were not included in the bill of sale, he observed that the order to withdraw was intended to be only co-extensive with the claim—a construction to which Gurney, upon the facts being communicated to him, assented. Therefore, taking into consideration the whole conduct of the parties in connection with the written order, the inference I am disposed to draw is, that that document was originally intended to be limited in the way mentioned; and, if that be the proper construction, the issues taken upon the replications to the pleas of justification must be found against the plaintiff, who sets up the *general* discharge. And that seems to me to dispose of the second point, which is, that the sheriff retained some small portion of the goods claimed under the bill of sale, and did not, in terms, obey the direction even in the qualified sense contended for on the part of the sheriff. Assuming that to be so, still it affords no ground for damages in this action, which is brought for seizing goods which the plaintiff alleges to be his. If they were his, the justification is made out; if Mrs. Cluse's, their seizure is no ground of action at the plaintiff's suit. (a) I therefore think the rule must be discharged.

COLTMAN, J. I am of the same opinion. This is an action of trespass for breaking and entering the plaintiff's dwelling-house, and seizing and converting his goods, with a plea justifying under a *fi. fa.* at the suit of Gurney upon a judgment against the now plaintiff. To this there is a replication, or a new assignment, (I assume it to be the latter,) admitting *333] the judgment and the **fi. fa.* and the entry of the sheriff under the writ, setting up an order or direction from the execution creditor to the sheriff to withdraw from possession. The meaning of that, upon this record, clearly is, that the sheriff received a direction to abandon the seizure as to *all* the goods. By this new assignment, the plaintiff complains that the sheriff, in defiance of that direction, continued in

(a) The plaintiff's possession of the goods is admitted by the pleadings.

possession of the house and goods. The rejoinder traverses the order as a general order to withdraw from all the goods. The issue is not divisible : it involves one single substantial allegation, the whole of which the plaintiff was bound to prove. That appears to me to be beyond all doubt. The question, therefore, is, whether or not the sheriff was in point of fact ordered to withdraw from the *whole* of the goods seized, or only from that portion to which the claim under the bill of sale applied. The paper itself undoubtedly appears to be general in its terms ; and, if it had rested upon that alone, I should have been disposed to think that upon this issue there ought to have been a finding for the plaintiff. But, look at the surrounding circumstances. It was not incumbent on the officer to withdraw immediately upon receipt of the order, if he had reason to think there was any mistake. The officer, in fact, did not immediately retire, but remained in possession, sorting the goods : and, upon Culverhouse, the clerk, applying to him to know why he had not withdrawn in obedience to the order, he pointed out to him that the claim made under the bill of sale did not embrace all the goods ; when Culverhouse told him the order was only intended to apply to such of the goods as Mrs. Cluse had claimed. The case, therefore, seems to be this :—The sheriff, being directed to withdraw, took upon himself, notwithstanding, to remain in possession without authority ; and two or three days afterwards he gets authority, by the ratification of that which he had *done. It has been said that the sheriff was a trespasser for so remaining in possession, and that the subsequent adoption will [*334 not avail as a justification of the original act of trespass. But I apprehend it to be quite clear, that, though a subsequent adoption or ratification will not render valid an act done altogether without reference to any authority, yet that it is otherwise where the party professes and intends to act as agent at the time. That distinction is recognised in the recent case of *Wilson v. Tuman*, 6 M. & G. 236, 6 Scott, N. R. 894. If this action be maintainable, it must be upon the ground that Gurney could not, after giving the paper in question to the officer, have pursued his rights under the *fi. fa.* It would be monstrous to hold such a doctrine.

MAULE, J. I also am of opinion that this rule should be discharged. The terms of the issue are an affirmation on the one side, and a denial on the other, that the sheriff was ordered to withdraw from the possession of the goods in the declaration mentioned, *or any part thereof* ; for, it is necessary to go so far, in order to make the replication a good answer to the plea. That being the sense of the issue, the question is, whether the affirmative of it was sustained by the evidence. Now, the discharge mentioned in the replication must be one that operated as between the execution-creditor and the now plaintiff, and not merely as between the sheriff and the execution-creditor. It appeared that a judgment had been obtained and a *fi. fa.* issued against the now plaintiff, and that the

sheriff seized the goods in the declaration mentioned under that writ ; and that, a claim having been made by Mrs. Cluse, Gurney, the execution-creditor, desires the sheriff to “ withdraw under the *fi. fa.* herein, the *335] goods having *been claimed.” That language, taken in combination with the circumstances under which the direction was given, was not binding even as between Gurney and the sheriff ; still less was it binding as between Gurney and Walker, between whom there was no privity at all. Gurney was clearly at liberty to revoke or to modify the order given by him. I therefore think the plaintiff has failed to sustain the issue, even as to the goods that were covered by the claim ; and, as the declaration includes goods that were not within the claim, on that ground also the evidence fails to sustain the issue, and therefore it was properly found for the defendants.

As to the other point—the declaration is for a trespass to the plaintiff’s house and goods. The plea justifies the breaking and entering the house, and seizing the goods, under a writ of *fi. fa.* To this plea there is a replication, (or a new assignment,) which, if true, gives a good answer to the plea. The rejoinder denies the truth of the replication. Upon this issue a verdict is found for the defendants. Supposing, therefore, that these were the only pleadings on the record, I do not see how a verdict for the plaintiff for 40s. damages could in any view be entered.

ERLE, J. I also think this rule must be discharged. The paper relied on for the plaintiff might amount either to a general or to a limited order. For the purpose of construing it, I think we may look at all the circumstances attending it. It appears that Gurney, the execution-creditor, was desirous of obtaining satisfaction upon his judgment, and that accordingly a writ of *fi. fa.* issued, under which the sheriff entered the house of the now plaintiff, and seized certain goods therein. A third person claiming under a bill of sale, Gurney’s attorneys did not choose to incur the expense of a contest, and therefore gave the sheriff a written authority *336] “in these terms :—“Withdraw from the *fi. fa.* herein, the goods having been claimed.” It seems to me that these words will receive an intelligible application, if they are construed as a direction limited to the goods covered by the claim. Suppose the sheriff had seized goods apparently the property of Walker, in two houses, that a third person had claimed the goods in one of them only, and that thereupon the attorney for the execution-creditor had given a direction, like this, to the sheriff—could any one doubt that the sheriff would have acted improperly if he had withdrawn at once from the whole seizure, without making some inquiry as to the intention of the order ? This case certainly is not quite so clear as the case I put. But, taking the order to withdraw, with the reason assigned, it seems to me to limit its application to the goods claimed, and that the officer was perfectly justified in the course he took.

Rule discharged.

*GRAFTON v. ARMITAGE. Nov. 24.

A. was employed by B. to devise a method of curving metal tubing for the purpose of manufacturing life-buoys, of which B. was patentee: *Held*, that A. might recover compensation for the labour and skill, and also the value of the materials, employed by him in the course of the work, under a count for work and labour and materials.

DEBT for work and labour and materials, and for money due upon an account stated. Plea, *nunquam indebitatus*.

At the trial before the under-sheriff of Middlesex, it appeared that the plaintiff claimed 5*l.* 5*s.* for work and labour, and materials employed in devising and constructing a machine or apparatus for the curving of metal tubing, to be applied in the construction of a life-buoy, of which the defendant was the patentee. The particulars of the plaintiff's demand were as follows:—

*“1844, December. For scheming and experimenting for, and making a plan-drawing of, a machine for the purpose of constructing and forming tubing to be applied to and in the manufacture of patent life-buoys, for the safety and preservation of boats and shipwrecked men, with specification; engaged three days, at one guinea per day	-	-	-	-	3	3	0	[*337
“1845, January 8. For workmen's time in making and fitting up a drum or mandrel, with nut and staple, and attaching same to lathe, in accordance with plan, and experimenting therewith, when the same was found to answer most satisfactorily	-	-	-	-	-	-	-	1 5 0
“For the use of the lathe for one week	-	-	-	-	-	0	12	0
“For wood and iron to make the drum, and for brass tubing for the experiments	-	-	-	-	-	-	0	5 0
							£5	5 0

“The defendant having announced his intention of attending the experiments on the 8th of January, 1845, and every thing being got ready for the purpose, they remained in that state for upwards of a week, during which time the use of a costly and valuable lathe was lost to the plaintiff.”

The plaintiff, it appeared, was a working engineer, and was employed by the defendant to devise some plan for a machine for curving metal tubes for the manufacture of a life-buoy, of which the defendant was the inventor; that the plaintiff prepared a drawing, and ultimately produced a ring or mandrel, which, according to the evidence, answered the purpose intended; and that models of air-tubes were made, and of a machine for making them.

*338] *On the part of the defendant it was insisted, on the authority of *Atkinson v. Bell*, 8 B. & C. 277, 2 M. & R. 292, that an action for work and labour was not under the circumstances maintainable, but that the action should have been for not accepting the goods.

For the plaintiff, *Clark v. Mumford*, 3 Camp. 37, was cited, where Lord ELLENBOROUGH ruled, that, under a general count in *indebitatus assumpsit* for work and labour and materials, the plaintiff might recover for attendances as a farrier, and for medicines administered in the cure of the defendant's horses.

A verdict was found for the plaintiff, damages 5*l.* 5*s.*, with leave to the defendant to move to enter a nonsuit, if the court should be of opinion that the action was misconceived.

Dowling, Serjt., on a former day in this term, accordingly obtained a rule nisi.

Byles, Serjt., showed cause. There was no contract in this case for the sale of any goods. The plaintiff's claim consists wholly of a demand for the application of labour and skill in the invention of a machine, for the more perfectly carrying into effect the object the defendant had in view. The case is not distinguishable from *Clark v. Mumford*. Lord ELLENBOROUGH there says: "Any species of work and labour may be given in evidence under such a general count; and the medicines here may be considered *materials* employed by the plaintiff in and about the business of the defendant." So, here, the wood, iron, and brass tubing may properly be considered *materials* employed in the experiments made *339] by the plaintiff for the defendant. *Atkinson v. Bell* is altogether a different case. That was a contract for the sale of goods: this is a mere contract for the exercise of the plaintiff's skill and ingenuity as a machinist, the materials being only accessory.

Dowling, Serjt., in support of his rule. If the evidence shows, as it clearly does, that the work and labour were bestowed upon the plaintiff's own materials, it is properly a contract for the sale of goods, and not work and labour. It is distinctly laid down in *Atkinson v. Bell*, that, to support an action for work and labour, that on which the work is performed must be the property of the defendant. BAYLEY, J., says: "In order to sustain an action for work, labour, and materials, the materials upon which the work and labour are performed must be the property of the employer. If a man, by my order, works on my land, or my house, or my furniture, it is my work, and I am at once liable to pay for it. But here Sheddon was working upon his own materials, and the contract between him and the defendants was properly a contract for the sale of goods, and not for work and labour." [MAULE, J. In order to sustain a count for work and labour, it is not necessary that the work and labour should be performed upon materials that are the property of the plaintiff, or that are to be handed over to him. ERLE, J. Suppose an attorney were employed to prepare a partnership or other deed: the draft would

be upon his own paper, and made with his own pen and ink; might he not maintain an action for work and labour in preparing it?] Here the contract was a contract for a machine—for goods: what difference can it make, that the plaintiff was not sufficiently skilled in his business to make the article without previous experiments? Those experiments were not made at the instance of the defendant.

*TINDAL, C. J. It appears to me that the present case is [*340 clearly distinguishable from *Atkinson v. Bell*, upon which the learned counsel for the defendant has placed his whole reliance. It is true that BAYLEY, J., there lays it down broadly, that, “if you employ another to work up his own materials in making a chattel, then he may dispose of the produce of that labour and those materials to any other person. No right to maintain any action vests in him during the progress of the work: but, when the chattel has assumed the character bargained for, and the employer has accepted it, the party employed may maintain an action for goods sold and delivered: or, if the employer refuses to accept, a special action on the case for such refusal. But he cannot maintain an action for work and labour, because his labour was bestowed on his own materials and for himself, and not for the person who employed him.” In the application of those observations, regard must be had to the particular facts of that case. There, Sheddon, (whose assignees the plaintiffs were,) a manufacturer of machinery, was employed by the defendants to make two spinning-frames. These spinning-frames were completed and packed, ready to be delivered to the defendants: but it was held, that, as the appropriation was not assented to by the defendants, there was no change of property, so as to entitle the plaintiffs to maintain an action for goods sold and delivered; (a) and that a count for work and labour and materials could not be sustained for the reason already stated, viz., that the work was done upon the bankrupt’s own materials, which still remained his property. The substance of the contract in that case was, goods to be sold and delivered by the one party to the other. Here, however, there never was any intention to make any thing that *could properly become the subject of an action for [*341 goods sold and delivered. But the plaintiff was applied to, to point out the proper mode of attaining a given object, and he brings his action for the work and labour done by him, and the materials used in the performance of that which he undertook to do, and which appears from the evidence to have been successfully done. I think it quite clear that the count for work and labour is the proper one to cover such a claim, and that the plaintiff is as much entitled to recover in respect of the application of his skill and scientific knowledge, as he would have been for mere manual work and labour. For these reasons, I think the rule for entering a nonsuit must be discharged.

COLTMAN, J. I am of the same opinion. *Atkinson v. Bell* is clearly

(a) Sed vide *Wilkins v. Bromhead*, 6 M. & G. 963; 7 Scott, N. R. 921.

distinguishable from the present case. The order there was for two spinning-frames to be made for the defendants: and, though the mere undertaking of the bankrupt to make two spinning-frames in pursuance of that order, did not vest in them the property in the identical frames when completed, in the absence of any assent on their part to the appropriation, still the contract was not a contract for work and labour. BAYLEY, J., puts that case upon precisely the same ground on which the Lord Chief Justice puts this case. The claim of a tailor or a shoemaker is for the price of goods when delivered, and not for the work and labour bestowed by him in the fabrication of them. LITLEDALE, J., says: "As to the count for work and labour and materials, the labour was bestowed and the materials were found for the purpose of ultimately effecting a sale; and, if that purpose was never completed, the contract was not executed." So, here, if this had been a contract by the plaintiff to make a machine for the defendant, the proper remedy would have been by an *342] action for goods *sold and delivered, or an action for not accepting the machine. Under those circumstances, *Atkinson v. Bell* would have been an authority. But here it appears that the plaintiff was merely employed to use his skill in devising a mode of carrying out the defendant's invention.

MAULE, J., concurred.

ERLE, J. I also am of opinion that the rule for entering a nonsuit in this case should be discharged. The fair result of the evidence is, that the plaintiff was employed to exert his skill and ingenuity in discovering a mode by which the curving of metal tubes might be effected for the better carrying out the defendant's invention. It appears to me to be quite clear that the proper form of declaring in such a case is, for work and labour.

Rule discharged.

WADE v. SIMEON. Nov. 24.

The plaintiff's attorney having given evidence on his behalf, and it being afterwards discovered that his client had previously assigned to him all his interest in the event of the suit, the court set aside a verdict found for the plaintiff, without entering into the consideration of the probable effect of the evidence so given upon the minds of the jury.

UPON the trial of this cause, before ERLE, J., at the sittings at Westminster after last Trinity term, one Russell, the plaintiff's attorney, was examined as a witness on his behalf, and a verdict was found for the plaintiff, damages 2000*l*. For the circumstances out of which the action arose, and the declaration, vide *Wade v. Simeon*, ante, vol. I. p. 610.

Shee, Serjt., on a former day in this term, obtained a rule nisi for a *343] new trial, principally upon affidavits *stating that Russell had, prior to the trial taking place, obtained from the plaintiff an assignment of all his interest in the action and in the damages that might

be obtained therein against the defendant, and that this fact had not come to the knowledge of the defendant, or of his attorney, until some days after the trial.

Channell and *Byles*, Serjts., now showed cause. The mere fact of a witness having been examined for the plaintiff at the trial who has an interest in the event, is not a ground for granting a new trial: *Dewdney v. Palmer*, 4 M. & W. 664, 7 Dowl. P. C. 177. In *Turner v. Pearte*, 1 T. R. 717, it was held that an objection to the competency of witnesses discovered after a trial, is not of itself a sufficient ground for granting a new trial; though it may have some weight with the court where the party applying appears to have merits. In the present case there is no affidavit of merits. BULLER, J., in that case says: "There has been no instance of this court's granting a new trial on an allegation that some of the witnesses examined were interested; and I should be very sorry to make the first precedent. Anciently, no doubt, the rule was, that, if there were any objection to the competency of the witness, he should be examined on the *voir dire*; and it was too late after he was sworn in chief. In later times, that rule has been a little relaxed; but the reason of doing so must be remembered. It is not that the rule is done away, or that it lets in objections which would otherwise have been shut out. It has been done principally for the convenience of the court; and it is for the furtherance of justice. The examination of a witness, to discover whether he is interested or not, is frequently to the same effect as his examination in chief; so that it saves time, and is more convenient, to let him be sworn in chief in the first instance; and in case it [*344 "should turn out that he is interested, it is then time enough to take the objection. But there never yet has been a case in which the party has been permitted, *after trial*, to avail himself of any objection which was not made at the time of the examination." And GROSE, J., said: "If the plaintiff will insist upon the strict rule relative to the incompetency of witnesses, the defendant has an equal right to avail himself of the rule that the objection now comes too late." Russell's evidence could not have influenced the verdict: he was only called to speak to matters that might have been altogether omitted from the declaration. [TINDAL, C. J. We cannot speculate upon the precise effect which Russell's evidence may have had upon the minds of the jury. He, as an attorney, must have known that his evidence was not admissible. MAULE, J. I think it is highly probable that the verdict would have been the other way, if the jury had known that Russell was substantially the plaintiff. I doubt whether the assignment can be sustained. The transaction looks very much like champerty, an offence that was formerly punished with the loss of the ears.] There is no precedent for such an application. [TINDAL, C. J. Such conduct in an attorney is happily without precedent; and I hope the like will not occur again.]

Shee, Serjt., (with whom was *Barstow*,) in support of the rule, was stopped by the court.

TINDAL, C. J. The case of *Turner v. Pearle* only decides, that the mere incompetency of a witness is not of itself a sufficient ground for granting a new trial. That, however, is not the ground upon which we mean to proceed here. We decide this upon the ground of *mala praxis*: the witness, the attorney upon the record, was the real plaintiff.

The rest of the court concurred.

Rule absolute.

*345] *LEVI v. PERRATT and Another. Nov. 25.

The court set aside the service of a writ of summons, the defendant being described therein as of "Bristol, in the county of Gloucester," and the service having taken place in the city of Bristol, in a place not within the county of Gloucester, or within 200 yards of the boundary.

CHANNELL, Serjt., on behalf of the defendant Perratt, obtained a rule nisi to set aside the service of the writ of summons, on the ground that he was described therein as of Bristol, in the county of Gloucester, and served in the city of Bristol, in a place not within the county of Gloucester, or within 200 yards of the boundary thereof. (a)

Byles, Serjt., showed cause. The court will take judicial notice that Bristol is a city and county of itself—*Rippon v. Dawson*, 5 N. C. 206; 7 Scott, 145; and will reject the inartificial and unnecessary statement in the writ, that Bristol is in the county of Gloucester.

TINDAL, C. J. It is not a mere inartificial statement: it is untrue. The rule must be made absolute.

The rest of the court concurred.

Rule absolute.

(a) A party seeking to set aside the copy of a writ of summons served in a wrong county, must state positively that the place of service is not within the county into which the writ issued, or within the prescribed distance from the boundary thereof: *Harrison v. Wray*, 11 M. & W. 815; 1 D. & L. 366. But the affidavit need not go on to state that there is no dispute as to boundaries: *Martin v. Granger*, 13 Law J., N. S., C. P. 176.

*346] *PEART v. HUGHES. Nov. 25.

Where the issue in an action to be tried before the sheriff has blanks for the teste and return of the writ of trial, the irregularity is waived unless the objection be taken promptly. And, where the defendant retained the issue for eight days, during which negotiations were going on, an application to set aside the issue and notice of trial for such irregularity, was held to be too late.

THE issue and notice of trial before the sheriff for the 21st of November, were delivered to the defendant's attorney on the 12th. On the 20th, several conversations having taken place in the mean time between the respective attorneys, as to settling the action and as to an admission of the handwriting of the defendant to the acceptance upon which the action was brought, and after the notice of trial had been countermanded,

Dowling, Serjt., obtained a rule nisi to set aside the issue and notice of trial, on the ground that blanks were left in the former, for the teste and return of the writ of trial.

C. Jones, Serjt., showed cause. The application is too late: the issue has been retained eight days without objection. The negotiations pending between the parties would also be enough to preclude the defendant from taking this objection.

Dowling, Serjt., in support of his rule. The defect complained of is not a mere irregularity: it is matter of error, and is therefore not cured by laches on the plaintiff's part. The issue, in its present form, is a nullity.

TINDAL, C. J. That which is complained of is a mere irregularity. The defendant should have come promptly. Having lain by for eight days, especially as *negotiations were going on in the mean time, [*347 I think the defendant has precluded himself.

The rest of the court concurred.

Rule discharged.

In the Matter of REBECCA DARLING. *Nov. 25.*

The court allowed an acknowledgment to be received and filed under the 3 & 4 W. 4, c. 74, s. 85, where the affidavit verifying the same was sworn before "The Provisional British Consul for the Society Islands," it appearing that there was no notary or any other official person before whom it could have been sworn within many hundred miles.

Channell, Serjt., moved to enlarge the time for returning a commission sent out to Tahiti, one of the Society Islands, in the South Seas, to take the acknowledgment of Rebecca, the wife of David Darling, and for leave to file the commission, certificate of acknowledgment, and affidavit verifying the same. The commission was directed to be returned on the 1st of February, 1845, but, by reason of circumstances disclosed in the affidavit upon which the motion was founded, it only reached England on the 18th instant. It also appeared that the commission had been directed to George Pritchard, her majesty's consul at Tahiti, and to several other British residents there, or to any two of them; that the deeds appeared to have been duly executed and acknowledged, and such acknowledgment was duly certified by two of the commissioners named in the commission; and that the affidavits verifying the same were sworn before "G. C. Miller, Provisional British consul for the Society Islands." The affidavit further stated that the packet in which the commission was returned contained a letter from David Darling, dated the 3d of February last, and addressed to the solicitors, stating that Mr. Pritchard had been removed *from his office of consul on the island of Tahiti by the [*348 French authorities, but that Mr. G. C. Miller, the nephew of General Miller, consul-general for the South Seas, had been appointed provisional consul for Tahiti, and that, in the absence of Pritchard, the

documents had been handed to him. The affidavit also stated that the deponent had been informed, and believed, that, in consequence of the French protectorate established in the island of Tahiti, occasioning the removal of Pritchard, and of the political events which had subsequently happened therein, there was no native or other authority before whom the affidavits of verification could be sworn, except Mr. Miller.

There was also an affidavit of Mr. Hertslet, sub-librarian of the Foreign Office, Downing street, who deposed that, "having the custody of the correspondence of her majesty's consuls abroad with the aforesaid office, he has become acquainted with the handwriting of G. C. Miller, Esq., Provisional British Consul for the Society Islands, in the South Seas, and that the name or signature 'G. C. Miller, &c.,' respectively set or subscribed to two affidavits exhibited to the deponent, and marked, &c., is, to the best of the deponent's knowledge and belief, of the proper handwriting of the said G. C. Miller."

It was further stated—but of this there was no affidavit—that there was no notary public at Tahiti, or within two thousand miles thereof.

TINDAL, C. J. The first part of the motion is mere matter of form. The only question is as to the rest. But, after the case of *In re Pickers-gill*,^(a) *I see no reason to doubt the propriety of the proceedings.

The rest of the court concurred.

Rule granted.

(a) 6 M. & G. 250; 6 Scott, N. R. 831, where the court allowed an acknowledgment to be received and filed under the 3 & 4 W. 4, c. 74, s. 85, the affidavit verifying the certificate being sworn before the minister of the British chapel at Moscow—it being sworn by the secretary of the Russia Company that that person was in the habit of administering oaths to British subjects there, and certified by two merchants resident at Moscow, that there is no English notary public, or British consul or vice-consul, within four hundred miles of that city.

PONTIFEX and Another v. WILKINSON. Nov. 25.

The plaintiffs contracted to fit up for the defendant a brewery at the house of a third person, the whole to be fixed complete for a certain sum, nothing being said about the time or mode of payment. When a portion of the work was done, the plaintiffs refused to complete it without security, which the defendant refused to give. In an action against the defendant for not permitting the plaintiffs to proceed with or complete the work, or paying for what was done, it was left to the jury to say by whose default the work was stopped. The jury having found a verdict for the defendant, the court declined to interfere.

ASSUMPSIT. The first count of the declaration stated, that on the 7th of July, 1842, in consideration that the plaintiffs, at the request of the defendant, had then agreed with and promised the defendant to manufacture and make, of the best materials and best workmanship, and fix complete, exclusive of any bricklayers' and carpenters' work, for him, certain goods and chattels named and specified in a certain specification or estimate, that is to say, &c., [setting out a special contract for the fittings up and utensils necessary for a brewhouse,] at and for a certain price or sum, to wit, the sum of 535*l.* 10*s.*, and to deliver the same to

him, and fix the same for him, when completed as aforesaid, the defendant promised the plaintiffs to permit and suffer them to perform and complete the said work on the terms aforesaid, and also to accept the said goods and chattels of the plaintiffs when so manufactured, made, and fixed as aforesaid, and pay for the same the price aforesaid on the delivery and fixing thereof: *Averment, that, although the plaintiffs, confiding in the said promise of the defendant, did afterwards, on the day and year aforesaid, commence, and in part manufacture, the said goods on the terms aforesaid, and had always been ready and willing, and still were ready and willing, to manufacture and complete the whole of the said goods, and fix the same when completed, upon the said terms, whereof the defendant, on, &c., last aforesaid, had notice; yet the defendant, on, &c., last aforesaid, did not nor would suffer or permit the plaintiffs further to proceed with, or complete, the manufacture of the said goods, but, on the contrary, wholly refused so to do, and afterwards, on, &c., last aforesaid, wrongfully and absolutely discharged the plaintiffs from proceeding with and completing the manufacture of the residue thereof; by means whereof they the plaintiffs had lost and been deprived of divers great gains and profits which would otherwise have arisen and accrued to them from the completion and fixing of the said goods; and the price and value of the work by them so done, and of the work to be by them completed, were unpaid and unsatisfied, and the said part-completed works had become and were of no value and wholly lost to the plaintiffs, &c. The declaration also contained counts for goods sold and delivered, for goods bargained and sold, for work and labour, and for money found due upon an account stated. [*350]

The defendant pleaded—first, non assumpsit—secondly, to the first count, that the plaintiffs were not ready or willing to manufacture and complete the whole of the said goods in that count mentioned, and to fix the same when completed, upon the said terms, in manner and form as the plaintiffs had in the said first count alleged—thirdly, to the first count, that he did suffer and permit the plaintiffs to proceed with and complete the manufacture of the said goods, and did not discharge the plaintiffs from proceeding with or completing *the manufacture of the residue thereof, or any part thereof, for the defendant, *modo et forma*—fourthly, to the first count, that, after the making of the said contract and promise by the plaintiffs and defendant respectively in that count mentioned, and before any breach thereof by the defendant, to wit, on the 12th of August, 1842, it was mutually agreed by the plaintiffs and the defendant, that neither of them should thereafter perform the said contract or promise on their respective parts, and that the same should be respectively then waived, abandoned, and rescinded, and that the plaintiffs and defendant should be then respectively discharged, and they then respectively discharged each other, from performing the said contract [*351]

and promise, and the said contract and promise were then, in pursuance of the last-mentioned agreement, respectively waived, abandoned, and wholly rescinded by the plaintiffs and defendant respectively—verification.

The plaintiffs joined issue on the first three pleas, and replied *de injuriâ* to the fourth, whereupon issue was joined.

The plaintiffs by their particulars of demand claimed 535*l.* 10*s.* in respect of the special contract set out in the first count of the declaration, 25*l.* “for preparing and copying the drawings of the machinery and plant in the first count mentioned, and for making a duplicate thereof for the defendant, and at his request, and which drawings were prepared for use in or about the month of July, 1842, and were then delivered to the defendant,” and 18*l.* 11*s.* 6*d.* for certain gun-metal cocks, levers, gauges, &c., supplied by the plaintiffs to the defendant.

The facts of the case were as follows:—In June, 1842, the defendant, who had contracted to fit up a brewery at Wimpole Hall, the seat of the Earl of Hardwicke, applied to the plaintiffs, who were copper-founders *352] *and vat and back makers, carrying on business in Shoe Lane, London, for an estimate for a copper, vats, and other fittings. Several communications having taken place between the parties, the defendant, on the 24th of June, wrote to the plaintiffs as follows:—

“T. Wilkinson’s compliments to Messrs. Pontifex & Wood, and begs to enclose them an outline of his idea of the sizes that will do for the brewery in question; but which he submits to their superior judgment, and will call in the morning, as arranged, to see what they have done in it previously to the estimate being gone into. [Here followed an enumeration of the articles required; which were to be ‘guarantied to be kept in repair, free of expense, for twelve months after its completion.’] So that all and every expense must be included in the estimate, whether specified or not, including a hand mashing-machine; so that you are to consider that you are to find every thing, except the bricklayers’ work, carpenters’ work, and the necessary labour requisite in moving heavy articles to fix them in their proper situations; which will place you in the same situation only as Mr. Wilkinson is bound.

“N. B. No extras whatever will be allowed.”

In reply to this note, the plaintiffs, on the 7th of July, addressed the defendant as follows:—

“A dome and pan copper, fitted up with chimney and valves, &c. &c., [here followed an enumeration and description of the several articles required,] men’s coach-hire and time travelling, carriage of the whole to the job, men’s diet and lodging; the whole of the above, fitted up with the best material of each different sort, and with the best workmanship, and fixed *353] complete, exclusive of any bricklayers’ or carpenters’ work, will *come to 535*l.* 10*s.* We also agree to repair any defect that may be found in the workmanship when the whole is set to work, and also to do

any repairs that may be required for twelve months from the time of being finished, provided such repairs are required in the fair wear and tear of the utensils, cocks, pipes, pumps, &c.; but we do not hold ourselves responsible in any way for any repairs that may be necessary to any part of the plant, caused by negligence, accident, wilful neglect, or otherwise than fair wear and tear."

On the 8th of July, the defendant again wrote to the plaintiffs as follows:—

"I have been confined to my room since I saw you, or you would have had the orders for the fittings of the brewhouse earlier. I beg you will put the copper immediately under hand; and it must be delivered at Wimpole in three weeks or a month, as the building is to be covered in by the end of July. The other part should be ready by the middle of August. I trust you will do all in your power to meet these arrangements. I must say the price is more than I expected, when I draw the comparison with the other house I spoke of, inasmuch as there is less pipe, and one pump less, and various other things. I really think you should make it the 500*l.* to cover all, as I must make the party a compliment of at least 10*l.*; and the same sum I have paid for the plans you saw. Be good enough to let me hear from you upon this subject; and let me have the other set of plans as early as you conveniently can."

On the 19th of July, the defendant wrote to a person in the employ of the plaintiffs as follows:—

"I trust you are getting on with the copper, as they are pushing me daily. Will you oblige me with a line *when it will be ready, and I will then direct the carrier to call for it. You must also [*354 get on with the backs and other things, fast: for, I find that the whole thing must be completed a month earlier than I expected. Perhaps you will send me a note when they will also be ready. The set of drawings for my use I have not yet received: also plan for setting the copper, at your early convenience.

"P. S. Be good enough to remind Mr. Pontifex to send me an answer to my last note."

On the 21st of July, the plaintiffs sent the following reply:—

"We put the whole of the work in hand as soon as the order arrived; but we fear we shall not be able to complete it as soon as you name. We will, however, do all in our power to meet your wishes, so that the quality of the work is not injured. We shall be most happy to make a reduction from the amount of contract, if we find, when the job is completed, that we can do so. The whole of the articles are put down as low as possible; but in fixing we are obliged to allow a certain latitude: therefore, it will much depend on what assistance we get on the spot: and, whatever our estimate of the expense of fixing exceeds the costs, we shall be happy to give you the benefit of."

On the 1st of August. the defendant wrote as follows:—

"T. Wilkinson will thank Messrs. Pontifex & Wood to send the following cocks, as described, as soon as possible, with a note when copper will be ready: and also the plans, which T. W. has not yet received."

This note contained an enumeration of the articles which constituted
 *355] the demand in the second count of "the declaration. The reply thereto, sent on the 12th of August, was as follows:—

"E. & W. Pontifex & Wood present their compliments, and beg to acquaint Mr. Wilkinson that, the dome of the copper having cracked in the working, they cannot proceed further with it till they get a dome; and it will be ten days before it is ready. *In the mean time, it will be advisable to make a final arrangement as to the payment. Mr. Wilkinson said he would pay as he received the money. This will be perfectly satisfactory, if he will give an order on Lord Hardwicke's steward for the amount.*"

In consequence of this note, some personal communication took place between the parties, which resulted in the defendant's giving the plaintiffs a reference as to his responsibility: and, on the 15th of August, the plaintiffs wrote:—"We have made the inquiry where you referred to; and it is not so satisfactory as to justify us in giving you credit for such an amount, without some security:" and, again on the 19th—"I will call on you any time you appoint next week, although I cannot see what use it will be, unless you are prepared to give some security. We have made inquiries of the party you referred us to; and they were so guarded and reserved in what they stated, that the reference cannot be considered as at all satisfactory. We are not desirous to drive you (as you seem to think) into a corner: we are desirous, on the contrary, to do all we can for your accommodation, consistent with our own security, which you very fairly admitted we were bound to look to."

On the 25th of August, the defendant, in a letter addressed to the plaintiffs, expostulated with them upon what he called "an attempt to
 *356] make an inroad upon "his credit and standing in society as a tradesman;" which elicited from one of the plaintiffs the following reply:—

"In the position in which things were when I saw you last, as men of business we could not be satisfied with any thing short of security. Being extremely desirous to ascertain the truth, we have been, and are, making other inquiries. We shall be most happy if the result *will* alter our views. When we have completed them, we will communicate with you, and will endeavour that the delay shall be as short as possible."

The defendant on the same day referred the plaintiffs to a firm at Birmingham, with whom he had extensive dealings; and on the following day he received another communication from them:—

"Since my letter of yesterday, we have made the inquiries referred to, which, we regret, confirm our impressions as to the necessity of a security. We had hoped that the result would have been different. Notwithstand-

ing our desire to give a favourable interpretation to our information, yet, as prudent and cautious men of business, we cannot, looking at all the circumstances, come to any other conclusion. *We must, therefore, beg the favour of your providing for us the required security, or giving us an order for payment upon the steward of the Earl of Hardwicke, or obtaining the promise of the architect to give us an order for payment of our account."*

On the 29th of August, the defendant wrote to the plaintiffs as follows:—

"The more I look into this transaction, the more strange it appears. I feel that you have done me a great injustice, and have not treated me as men of business. I am quite prepared to prove that my references and *standing are quite sufficient for any reasonable person not to [357] doubt. As such, I shall positively decline giving you any security, much more any order upon my customer, as it is not usual for respectable people to stoop in that manner, unless there is some particular cause. I have therefore sent my friend for your final answer as to whether you give up the order or finish it at once, as I cannot allow it to go on unless you give an undertaking to deliver and fix the whole in one month from this time. The cocks, not being sent in time, I must decline taking, as I have got them elsewhere, without being insulted, as I consider I am in this business."

The plaintiffs' reply to this letter, dated the same day, was as follows:—

"We assure you that we extremely regret the position we are in with you. With every disposition to maintain the kindly feelings with which we commenced, we find, that, as men of business, we are unable to pursue any other than the plan we have proposed to you for security. We should propose to take the payment you would receive, but that you should contrive some means by which we may be assured that the money would fall into our hands. We are aware that this is only another mode of asking security: but we wish to leave the mode to yourself by which we may be made secure. If you were in our position, you would at once perceive that we are only doing that which you yourself would do. The cocks are nearly ready."

On the 30th of August, the defendant's attorney wrote to the plaintiffs as follows:—

"My client, Mr. Wilkinson, of the Quadrant, Regent street, has sent me a contract entered into by you with him, and some correspondence relating thereto. In ignorance of the plan upon which your firm conducts its *business, it does appear to me that your course of con- [358] duct in this matter savours of injustice, if not of vexatious and untradesman-like conduct. I am, of course, open to your version of the story; but, as at present instructed, I find a contract anxiously sought for, and entered into, by you, for the supplying certain work to Mr. Wilkinson. This contract is dated the 7th of July. On the 21st you write the

work is in progress of completion; and on the 12th of August Mr. Wilkinson is for the first time called upon to satisfy you of his responsibility. Surely, it became you to be less tardy in taking this new ground. However, he refers you to a respectable house, from which you receive assurances which would have been satisfactory, but for reasons in no way affecting my client. Mr. W. then refers you to a very substantial firm at Birmingham, with whom he has long transacted business. You decline to apply. Mr. Steel, a very respectable man, then takes the trouble to call on you; and, from his statement, it appears you have conceived some opinion prejudicial to Mr. Wilkinson's propriety of conduct. And I therefore call upon you, as respectable men, in common justice, to allow him an opportunity to remove these impressions. I must require this, independently of any existing difference between you."

To this letter the plaintiffs answered on the 31st as follows:—

"In reply to your letter, we have to state that we have never 'conceived any opinion prejudicial to Mr. Wilkinson's propriety of conduct,' but that we were not satisfied with the reference Mr. Wilkinson gave us, and *we therefore require some security for the payment of our goods, before they are delivered.*"

The defendant's attorney on the same day addressed the plaintiffs as follows:—

*359] "As I find, from the tenor of your reply to my letter, that we shall be unable to settle this matter, I have no alternative but to advise my client to insist on your completion of your contract, if he considers it beneficial; as I consider you should have doubted his responsibility before you agreed to furnish the work."

On the 14th of September the defendant's attorney again addressed the plaintiffs as follows:—

"I communicated your conditions for performance of the works on account of Mr. Wilkinson, to him; and, although I still contend that it was quite out of your power to maintain the position you assumed, we have considered it more desirable to dispense with your assistance in the matter; and I accordingly beg to return your plans. I have satisfied myself of Mr. Kepp's disposition to afford every information as to the credit, to the amount required by Mr. Wilkinson. You will oblige me by giving any plans you hold belonging to Mr. Wilkinson, to the bearer."

To this the plaintiffs replied on the same day:—

"Although Mr. Wilkinson may 'consider it more desirable to dispense with our assistance,' in the supply of the goods he has ordered, we shall not submit to the loss of making the various articles, and have them thrown on our hands; which we suppose is what you mean by the above observation. As soon as finished, we shall require payment for them; and you will consider this as a notice to that effect."

The cause had already been once tried, and a verdict found for the plaintiffs, which was set aside by the court, and a new trial directed, on

payment of costs.^(a) The second trial took place before ERLE, J., at the sittings in London after last Trinity term.

*It was submitted, on the part of the plaintiffs, that the contract, to be collected from the correspondence, was a contract, on the defendant's part, to pay for the work on its completion, and that it was not competent to him, during the progress of it, to introduce a new condition for an unlimited credit. [*360]

For the defendant, it was insisted that the plaintiffs were bound, in pursuance of their contract, to deliver and fix the work before demanding payment, and, consequently, that their refusal to proceed with it unless furnished with security, altogether discharged the defendant.

The learned judge left it to the jury to say what was the real contract between the parties, to be collected from the correspondence; telling them, that, in his opinion, the evidence did not take the case out of the statute of frauds as to the second branch of the demand, and that the plaintiffs could not recover in respect of the plans, except as ancillary to the special contract.

The jury having returned a verdict for the defendant,

Sir T. Wilde, Serjt., on a former day in this term, moved for a new trial on the ground of misdirection, and that the verdict was against evidence. The question of law, that is, the construction of the written contract between the parties, was improperly left to the jury; for, this case is not within the exception to the general rule—that the construction of written instruments belongs to the court alone. The contract is, for the fitting up of a brewery, upon the terms of payment in cash upon the completion of the work: there is nothing importing that any credit whatever is to be given. When the work was approaching to completion, viz., about the beginning of August, the plaintiffs appear for the first time to have received an intimation from the defendant that he did not mean to pay for the work when finished, *but must take an indefinite credit. [ERLE, J. The plaintiffs, by the contract, undertook to deliver and fix the work, and the defendant undertook to pay for the fixing. That was a contract on the one side to deliver and fix, and on the other, to pay for the work when delivered and fixed. The plaintiffs afterwards decline to perform their part of the contract unless they get security. Surely, they had no right to impose any such condition.] It may be conceded that the plaintiffs were bound by the terms of the original contract, to deliver and to fix the work before they demanded payment. But their claim to a verdict is founded upon this, that the defendant, by afterwards seeking to impose a condition for unlimited credit, discharged them from further performing the contract, and that they are entitled to compensation for so much of the work as had then been done. Consider the nature of the work—the erection of a brewery upon the premises of a third person. It is not like the case of a carriage, or any other

(a) Vide antè, vol. i. p. 75.

movable chattel, that may be taken back if not paid for: once fixed, the plaintiffs would have no remedy, but the doubtful one of an action against their customer. In *Goss v. Lord Nugent*, 5 B. & Ad. 58, 2 N. & M. 28, and *Marshall v. Lynn*, 6 M. & W. 109, the contracts were complete, and there had been part performance. [MAULE, J. The rule as to contracts in writing not being allowed to be varied by parol, applies only where the contract is required by law to be in writing. *Goss v. Lord Nugent* was the case of a sale of land.] *Stowell v. Robinson*, 3 N. C. 928, 5 Scott, 196, was a case of the same description, where there was an attempt to substitute one day for another, by parol, in a contract for the sale of a public-house. The letters of the 12th and 15th of August clearly show that the
 *362] defendant had departed from the terms of the *contract by requiring credit. The plaintiffs never refused to proceed with the work on the terms upon which they had first contracted. [ERLE, J. The letters were evidence from which the jury were to infer whether or not the plaintiffs had performed the contract on their part, and whether the defendant had, by his conduct, discharged them from performing it.]

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court.

In this case a motion has been made for a new trial on the ground of the verdict being evidence: and my brother Wilde, upon making the motion, having stated that the whole question arose upon the legal construction to be put upon the letter which passed between the parties, the court desired it might be furnished with a copy of the correspondence, before it decided whether the rule should be granted or not. That copy has been furnished to us; and we are of opinion, upon consideration of such correspondence, and of the evidence, that no rule ought to be granted.

The question substantially raised at the trial was, whether the non-performance by the defendant of the contract by which the plaintiffs had agreed to supply and fix for the defendant certain brewing apparatus, which the defendant had to get supplied and fixed at a brew-house belonging to Lord Hardwicke, and by which contract the defendant had agreed to accept and pay for the same on the delivery and fixing thereof, was occasioned by the fault of the plaintiffs or of the defendant. It was insisted, on the part of the plaintiffs, both at the trial and on the motion for the rule, that the evidence showed that the plaintiffs were willing to abide by the contract as originally made, but that the defendant had re-
 *363] fused to do so, or to let them proceed, unless they *would consent to accept payment at a later time than that at which they were, by the contract, entitled to claim it. The defendant, at the trial, insisted that it was by the default of the plaintiffs that the contract was unperformed; inasmuch as they, the plaintiffs, had refused to proceed with the order, unless security were given for the payment—a condition which they had no right to impose, as the contract was altogether silent upon the subject.

The jury were of this latter opinion ; and we think they were right.

Great stress was laid, on the part of the plaintiffs, on an expression found in a letter of theirs of the 12th of August, in which they say : " Mr. Wilkinson said he would pay as he received the money : this will be perfectly satisfactory, if he will give us an order on Lord Hardwicke's steward for the amount." ' This, it was contended, showed that the defendant had insisted on being allowed to defer the payment, from the time at which he was bound to make it, viz. on the machinery being delivered and fixed, till some future time, when Lord Hardwicke's steward might pay him. And it was also contended that this was confirmed by another expression in a letter of the plaintiffs to the defendant on the 15th of August, 1842, in which the plaintiffs say : " We have made the inquiry which you refer to ; and it is not so satisfactory as to justify us in *giving credit* for such an amount without some security : " the term " *giving credit* " necessarily meaning, as it was contended, a postponement of the payment till some time after the fixing ; and being inapplicable to a payment according to the contract. But we think the expression in the letter of the 12th of August refers only to an offer made by the defendant, on the plaintiffs expressing doubts of his solvency, to pay them out of a particular fund which would enable him to do so ; and *not to any extension of the time of payment which he required to be [*364 made. And, as to the letter of the 15th of August, we think the plaintiffs might reasonably, and did actually, apply the term " *credit* " to the trust they would necessarily repose in the solvency of the defendant by making delivery and fixing the work before payment, according to the contract.

The whole dispute, as shown by the correspondence, was, whether the defendant would give the security which the plaintiffs insisted on, and had no right to insist on : and there was no question about a postponement of the payment, which the defendant, on his part, had no right to insist on, and which in fact he did not ask for.

Upon the whole, after the consideration we have had the opportunity of giving to this case, we think no rule should be granted.

Rule refused.

In the Matter of the Rev. GEORGE STREET, and CHARLES STREET. Nov. 25.

The court refused to allow an affidavit, and notarial certificate of an acknowledgment to be filed, under the 3 & 4 W. 4, c. 74, s. 85 ; the affidavit purporting to be sworn before one " G., a commissioner for taking affidavits in the court of Queen's Bench, Canada West," and the notary certifying him to be a commissioner of *that* court, and, *as such*, qualified to administer oaths.

CHANNELL, Serjt., moved that the proper officer might be directed to receive and file the affidavit and notarial certificate of an acknowledg-

ment taken in Canada, pursuant to the 3 & 4 W. 4, c. 74, s. 85. The affidavit purported to have been sworn before one Garrett, described as 'a commissioner for taking affidavits in the court of Queen's Bench, Canada West ;' *and the notarial certificate stated Garrett to be *365] "a commissioner for taking affidavits in the court of Queen's Bench, Canada West, and *as such* duly qualified to administer oaths." It was objected by the officer that this did not show Garrett to be qualified to administer oaths in matters other than those arising in the court of Queen's Bench, in Canada West.

Per curiam. The description and the certificate do not show that the affidavit was sworn before a properly constituted authority.

Channell took nothing.

END OF MICHAELMAS TERM.

*366]

*MEMORANDA.

In the vacation after Trinity term, Mr. Serjt. *Shee* received a patent of precedence, to take rank next after *William Page Wood*, Esq. Q. C.

In the same vacation, *Montagu Chambers*, of Lincoln's Inn, Esq., was appointed one of her majesty's counsel learned in the law.

In the same vacation, *Robert Allen*, of Gray's Inn, Esq., having received her majesty's writ issued in vacation, under the 6 G. 4, c. 95, and having in the same vacation taken the oaths usually administered to persons called to the degree and office of serjeant-at-law, became, under the provisions of that act, a serjeant-at-law sworn. He gave rings with the motto—" *Hic, per tot casus.* "

CASES
 DETERMINED
 IN THE
COURT OF COMMON PLEAS,
 AND
 UPON WRITS OF ERROR FROM THAT COURT
 TO THE
 EXCHEQUER CHAMBER,
 IN
Michaelmas Vacation,
 IN THE NINTH YEAR OF THE REIGN OF VICTORIA.

HINTON v. WILLIAM EDWARD ACRAMAN. Dec. 23.

To debt against one of the principals, on a bond, with sureties, given under the 1 & 2 Vict. c. 110, s. 8,—reciting, “that the plaintiff had filed and served an affidavit of debt in bankruptcy against the defendant and his partners, and conditioned for the payment of such sums as should be recovered in any action which had been, or should be, brought for recovery of the debt, or for the render of themselves by the defendant and his partners to the custody of the court in which such action had been, or might be, brought *according to the practice of such court, or within such time, and in such manner, as the said court, or any judge thereof, should direct, after judgment should have been recovered in such action or actions,*” the defendant pleaded, that, after the recovery of the judgment, and before the commencement of the action, *no ca. sa.* was sued out against the defendant and his partners, or any of them:—*Held*, a good plea.

The declaration further stated a judgment recovered by the plaintiff in the court of Exchequer, for the debt in the condition of the bond mentioned; and that, after the recovery of the judgment, an order was made by Coleridge, J., on the *ex parte* application of the plaintiff, that the defendant and his partners should render themselves within ten days after service of the order:—*Held*, that a plea that the order of Coleridge, J., was made before the time for rendering the defendant and his partners according to the practice of the court had expired, and was made *ex parte*, and without any previous summons, was bad; for, that it was consistent with the order that the time for rendering would have expired before the time limited by that order for the defendant and his partners to render; and it was no ground of objection to the order that it was made *ex parte*, such irregularity (if any) not being the proper subject of a plea.

The declaration also alleged that the time for rendering had been further extended, by two orders of Cresswell, J., until the fifth day of Michaelmas term; that, before that day a rule nisi was obtained to set aside the order of Coleridge, J., and to enlarge the time to render, by which rule the proceedings in the original action and against the bail were stayed; and that the defendant and his partners did not render themselves within the time mentioned in the orders, or any of them, or within any other time, or in any manner lawfully directed by the court, or any judge thereof. Plea, that the first order was made before the time of the render of the defendant and his partners according to the practice of the court; that the subse-

quent orders, and the rule nisi, were respectively made before the expiration of the extended times for rendering; that, on cause being shown against the rule nisi, the court ordered "that the defendant and his partners, and their bail or sureties," should have ten days further time to render; and that, before the expiration of the ten days, they did render:—*Held*, a good plea, on the ground that the rule nisi staying the proceedings, preserved the jurisdiction of the court to grant the further extension of the time.

The defendant further pleaded that an action had already been brought by the plaintiff against the defendant and his partners before the execution of the bond, to recover the debt in the condition mentioned; that that action was still pending, and, that the present action was not commenced until after the execution of the bond:—*Held*, bad.

Held also, that the bankruptcy and certificate of the defendant and his partners after the commencement of the action in which the judgment was obtained, but before judgment, furnished no answer to an action upon the bond; the demand arising thereon not being a debt (contingent or otherwise) provable under the fiat, by virtue of any of the provisions of the 6 G. 4, c. 16.

DEBT, on a bond given by the defendant and others under the 1 & 2 Vict. c. 110, s. 8.

The declaration stated that the defendant, on the 9th of April, 1842, by
 *368] his certain writing obligatory, sealed *with his seal, became held
 and firmly bound unto the plaintiff in 2700*l.*, to be paid, &c., and
 that such writing obligatory was and is subject to a certain condition
 thereunder written, whereby—after reciting that the plaintiff had, under
 the provisions of a statute made and passed in the first and second years
 of the reign of her present majesty Queen Victoria, (thereby meaning a
 certain statute made and passed in a parliament holden in the first and
 *369] second years of the said reign,) filed an *affidavit in her majesty's
 court of bankruptcy, to the effect that a certain debt amounting
 to 1650*l.* was justly due to him from the defendant and D. W. Acraman,
 A. J. Acraman, T. Holroyd, and W. Morgan, and that the defendant and the
 said D. W. Acraman, A. J. Acraman, Holroyd, and Morgan were, as he the
 plaintiff verily believed, traders within the meaning of the laws then in
 force concerning bankrupts; and also reciting that the plaintiff had, on
 the 23d of March, in the year aforesaid, caused each of them, the defend-
 ant and the said A. J. Acraman respectively, to be personally served with
 a copy of such affidavit, and with a notice in writing requiring immediate
 payment of such alleged debt of 1650*l.* and the bankers' commission
 and interest due thereon, and that the plaintiff had also, on the 24th of
 March, in the year aforesaid, caused the said Morgan to be personally
 served with a copy of such affidavit, and with a like notice; and also
 reciting that J. O. Bridges and J. A. Ballantine had agreed to join the
 defendant and the said D. W. Acraman, A. J. Acraman, Holroyd, and
 Morgan in the said writing obligatory, subject to the condition for mak-
 ing the same void as thereafter written, as sureties for the defendant
 and the said D. W. Acraman, A. J. Acraman, Holroyd, and Morgan—
 the condition of the writing obligatory was declared to be, that, if the de-
 fendant and the said D. W. Acraman, A. J. Acraman, Holroyd, and Mor-
 gan, Bridges, and Ballantine, or any of them, their or his heirs, execu-
 tors, or administrators, should pay, or cause to be paid, to the plaintiff,
 his executors, administrators, or assigns, such sum or sums as should be

recovered in any action or actions which then had been, or thereafter should be, brought for recovery of the said alleged debt, together with such costs as should be given in the same; or, if the defendant and the said D. W. Acraman, A. J. Acraman, Holroyd, and Morgan should render themselves to the *custody of the jailer of the court in which such action or actions had been, or might be, brought, *according to the practice of such court or courts, or within such time, and in such manner as the said court or courts, or any judge thereof respectively, should direct*, after judgment should have been recovered in such action or actions—then the writing obligatory to be void, &c.: Averment, that afterwards, and after the making of the said writing obligatory and condition, to wit, on the 15th of July, in the year aforesaid, a certain action was commenced by the plaintiff against the defendant and the said D. W. Acraman, A. J. Acraman, Holroyd, and Morgan, in H. M. court of Exchequer at Westminster, for the recovery of the debt in the said condition mentioned, together with such costs of the plaintiff as should be given in the same; and that such proceedings were thereupon had in the said action, by and at the suit of the plaintiff against the defendant and the said D. W. Acraman, A. J. Acraman, Holroyd, and Morgan, in the said court of Exchequer, that afterwards, to wit, on the 12th of August, in the year aforesaid, the plaintiff, by the consideration and judgment of the last-mentioned court, recovered against the defendant and the said D. W. Acraman, A. J. Acraman, Holroyd, and Morgan, the sum of 1698*l.* 5*s.*, which in and by the last-mentioned court was then adjudged to the plaintiff for his damages which he had sustained, as well on occasion of the not performing by the defendant and the said D. W. Acraman, A. J. Acraman, Holroyd, and Morgan, of a certain promise then lately made by the defendant and the said D. W. Acraman, A. J. Acraman, Holroyd, and Morgan, to the plaintiff, as for his costs and charges by him about his suit in that behalf expended; and that thereof the defendant and the said D. W. Acraman, A. J. Acraman, Holroyd, and Morgan, were convicted; that the sum of 1650*l.*, parcel of the sum of 1698*l.* 5*s.* [*370] so recovered as aforesaid, was and is the debt in the condition mentioned, and is, together with the sum of 33*l.* 11*s.* 6*d.* interest upon the said sum of 1650*l.*, the amount which in and by the last-mentioned court was adjudged to the plaintiff for his damages by him sustained on occasion of the not performing of that promise, and that the sum of 14*l.* 13*s.* 6*d.*, residue of the said sum of 1698*l.* 5*s.*, was the amount of damages adjudged to the plaintiff in and by the last-mentioned court, for his costs and charges by him about his suit in that behalf expended; and that of all the several premises the defendant, before the commencement of the suit, to wit, on the 13th of August, in the year aforesaid, had notice: that the defendant and the said D. W. Acraman, A. J. Acraman, Holroyd, and Morgan did not, nor did any of them, or any of their heirs, executors, or administrators, nor did the said Bridges and Ballantine, or either of

them, their or any or either of their heirs, executors, or administrators, at any time before the commencement of this suit, pay, or cause to be paid, to the plaintiff the said sum of 1698*l.* 5*s.* so recovered as aforesaid, or any part thereof, according to the form and effect of the said condition : that, after the recovery of the said judgment, to wit, on the 19th of August, 1842, a certain order was duly made in the last-mentioned cause, on the application of the plaintiff, by the Hon. Sir J. T. COLERIDGE, knt., one of the justices of the court of Queen's Bench, by which order the said Sir J. T. COLERIDGE, so being such justice as aforesaid, ordered that the defendant and the said D. W. Acraman, A. J. Acraman, Holroyd, and Morgan should surrender themselves to the custody of the marshal of the Queen's prison within ten days after service of a copy of that order on the defendant and the said D. W. Acraman, A. J. Acraman, Holroyd, and Morgan, and on

*372] the said Bridges and Ballantine ; and that a copy of the said *order was afterwards, to wit, on the 20th of August, 1842, duly served on the defendant and the said A. J. Acraman, Holroyd, and Morgan, and the said Bridges and Ballantine, and that a copy of the said order was afterwards, to wit, on the 23d of August, 1842, duly served on the said D. W. Acraman : that, ten days after service of a copy of the said order on the defendant and the said D. W. Acraman, A. J. Acraman, Holroyd, and Morgan, and on the said Bridges and Ballantine, had, before the commencement of the suit, long elapsed ; that, afterwards, and after the recovery of the said judgment, to wit, on the 26th of August, 1842, the Hon. Sir C. CRESSWELL, knt., one of the justices of the court of Common Pleas at Westminster, did make a certain other order in the last-mentioned cause, and that by the last-mentioned order the said Sir C. CRESSWELL, so being such justice as aforesaid, did order that the time for the defendant and the said D. W. Acraman, A. J. Acraman, Holroyd, and Morgan to render in that cause, should be enlarged for a week, and that the further hearing of a certain summons to set aside the said order of the Hon. Mr. Justice COLERIDGE, for the defendant, and the said D. W. Acraman, A. J. Acraman, Holroyd, and Morgan to render, should be adjourned until the 2d of September, 1842 : that, on the 2d of September, 1842, a certain other order was made in the last-mentioned action, by the said Sir C. CRESSWELL, so being such justice as aforesaid, and that, by the last-mentioned order, the said Sir C. CRESSWELL did order that the time for surrendering the defendant and the said D. W. Acraman, A. J. Acraman, Holroyd, and Morgan should be enlarged until the fifth day of the then next Michaelmas term, without prejudice to the right of the bondsmen to render the defendant and the said D. W. Acraman, A. J. Acraman, Holroyd, and Morgan in the mean time, or to the right of the plaintiff to treat the bond

*373] as *forfeited : that, afterwards, to wit, on the 4th of November, Michaelmas term, 6 Vict. 1842, a certain rule was made by the court of Exchequer in the last-mentioned action, and that by such rule

it was ordered that the plaintiff should show cause on Wednesday, the 9th day of November then instant, why the said order of COLERIDGE, J., and all proceedings thereupon had, should not be set aside, with costs to be paid by the plaintiff, together with the costs of the proceedings before CRESSWELL, J., in relation to the said order, (being the proceedings hereinbefore in that behalf mentioned,) and of that application, or why the defendants (thereby meaning the defendants in the last-mentioned action) should not have a fortnight after judgment pronounced on that rule, or such other time as the court should order in that behalf, to render themselves into custody as to the last-mentioned action, in discharge of their bail; and why all proceedings upon the bond should not be set aside, with costs; and that, in the mean time, all proceedings in the last-mentioned cause, and against the defendant's bail, should be stayed, upon notice of that rule being given to the plaintiff, his attorney or agent: that neither the now defendant nor the said D. W. Acraman, A. J. Acraman, Holroyd, and Morgan, nor any of them, rendered themselves or himself to the custody of the jailer of the said court of Exchequer, according to the practice of the same court, or within the time mentioned in the said orders, or any of them, after judgment had been so recovered as aforesaid, or within any other time, or in any manner lawfully directed by the same court, or any judge thereof, after judgment had been so recovered as aforesaid, and according to the form and effect of the said condition, but wholly neglected, omitted, and refused so to do; and that the condition of the said writing obligatory was and remained wholly unperformed, contrary to the *form and effect of the said writing obligatory, and of the said condition thereof: *per quod actio accrevit*, &c.: profert of the [374 writing obligatory, &c.

Second plea—that, after the recovery of the judgment in the declaration mentioned, and before the commencement of the suit, no writ of *capias ad satisfaciendum* was sued or prosecuted out of the said court of Exchequer against the defendant and the said D. W. Acraman, A. J. Acraman, Holroyd, and Morgan, or any of them, upon the said judgment, and returned in the said court—verification.

Fourth plea—that the order so made by COLERIDGE, J., as in the declaration mentioned, was made before the time for rendering the defendant and the said D. W. Acraman, A. J. Acraman, Holroyd, and Morgan, in the action so commenced against them as in the declaration mentioned, according to the practice of the said court of Exchequer, had expired or elapsed; and that the said order was made *ex parte*, on the application of the plaintiff, and without any previous summons of, or any previous notice to the defendant and the said D. W. Acraman, A. J. Acraman, Holroyd, and Morgan, or any of them, or any agent, attorney, or solicitor of them, or any of them—verification.

Fifth plea—that the said order was so made by COLERIDGE, J., as aforesaid, before the time for rendering the defendant, the said D. W.

Acraman, A. J. Acraman, Holroyd and Morgan, in the said action, according to the course and practice of the court in which the same was so brought as aforesaid, had expired or elapsed; and that, after the making of the said order by COLERIDGE, J., as in the declaration mentioned, and before the said ten days after the service of the said copy of the said order as in the declaration mentioned had expired or elapsed, the said order stated in the declaration to have been first made by CRESSWELL, J., *375] was made by him *as in the declaration mentioned, to wit, on the day and year in that behalf aforesaid; and that afterwards, and before the expiration of the time given and appointed in and by the last-mentioned order, for the making of the said render as therein and in the declaration mentioned, the order stated in the declaration to have been secondly made by CRESSWELL, J., was made by him, then being such justice as aforesaid, as in the declaration mentioned, to wit, on the day and year in that behalf aforesaid; and that afterwards, and before the said fifth day of Michaelmas term, the rule so made by the court of Exchequer as in the declaration mentioned, was made by the said court, to wit, on the day and year in that behalf aforesaid: that afterwards, and within a reasonable time for that purpose, to wit, on the day and year last aforesaid, notice of the said rule was given to the plaintiff, as in and by the same directed, and according to the course and practice of the said court; and that afterwards, in Michaelmas term, 1842, to wit, on the 24th of November, in the year aforesaid, cause was shown against the said rule, and the said rule and matters therein contained were argued and discussed before the court aforesaid, according to the course and practice of the last-mentioned court; and the said court did, thereupon, by a certain other rule then duly made according to the course and practice thereof, among other things, order and direct that the now defendant and the said D. W. Acraman, A. J. Acraman, Holroyd, and Morgan, and their bail or sureties, Bridges and Ballantine, should have ten days from the day of the making of the rule now in recital, to render the now defendant, the said D. W. Acraman, A. J. Acraman, Holroyd, and Morgan, in the action so brought against them as aforesaid: that afterwards, and before the commencement of this suit, and before the expiration of ten days from the making of the last-mentioned rule, and within the time for that purpose *376] *therein limited and appointed, as aforesaid, to wit, on the 28th of November in the year aforesaid, the now defendant, the said D. W. Acraman, A. J. Acraman, Holroyd, and Morgan, did, and each and every of them did respectively, render themselves to the custody of the jailer of the said court, as in and by the last-mentioned rule was directed and ordered, and according to the form and effect, true intent and meaning of the said condition—verification.

Sixth plea—that, *after the making of the writing obligatory in the declaration mentioned*, to wit, on the 10th of June, 1842, and from thence continually, &c., the defendant and the said D. W. Acraman and A. J

Acraman were dealers, chapmen, and co-partners, and traders according to and within the true intent and meaning of the statutes concerning bankrupts then in force, and became indebted to certain persons in the sum of 100*l.* and upwards, and, being such traders, and so indebted, committed acts of bankruptcy; that a fiat issued against them, under which they were duly declared bankrupts; that the defendant and D. W. Acraman and A. J. Acraman, having duly surrendered and submitted themselves to be examined under the fiat, afterwards, and *after the recovery of the judgment in the declaration mentioned*, to wit, on the 22d of August, 1842, obtained their certificates, and that the same were duly allowed and confirmed by the court of Review; and that the several events in this plea before mentioned took place, and the said certificates were obtained, allowed, and confirmed as aforesaid, before the commencement of this suit, and before the issuing and return of any *capias ad satisfaciendum* at the suit of the plaintiff against the defendant and the said D. W. Acraman, and A. J. Acraman, or any of them, upon the said judgment, and before any render of the defendant and the said D. W. Acraman and A. J. Acraman, or any of them, at any time or in any manner, had been directed or ordered by the said court of Exchequer, or any judge thereof, and before the time for the defendant and the said D. W. Acraman and A. J. Acraman, or any of them, to render themselves, or any of them, to the custody of the jailer of the said court of Exchequer, according to the practice thereof, had elapsed, and before any breach or non-performance of the said condition, or any part thereof—verification. [*377]

Seventh plea—that, before the making of the writing obligatory, and long before the commencement of the action in the declaration mentioned, to wit, on the 30th of March, 1842, a certain action was commenced by the plaintiff against the defendant and the said D. W. Acraman, A. J. Acraman, Holroyd, and Morgan, in the court of Exchequer, for the recovery of the same identical debt in the condition mentioned, together with such costs of the plaintiff as should be given in the same; and that the said action then, and from thence until and at the time of the making of the said writing obligatory, was, and from thence had been and was still pending in the said court of Exchequer, and that the plaintiff could and might have recovered, and may recover, in the last-mentioned action the debt in the condition of the said writing obligatory mentioned; that, at the time of the making of the said writing obligatory, the action in the declaration mentioned had not been commenced; and that the said writing obligatory was then meant and intended by the several parties thereto, to apply, and did apply, to the action so commenced by the plaintiff as in that plea mentioned, and was not by the said parties, or any of them, meant or intended to apply, and did not apply, to the action so commenced, and in which judgment was so obtained, as in the declaration mentioned—verification.

*378] Eighth plea—that, after the making of the said *writing obligatory, to wit, on the 15th of June, 1842, and from thence continually, &c., the defendant and the said D. W. Acraman, A. J. Acraman, Holroyd, Morgan, and J. N. Franklyn, were ship-builders, boiler-makers, engineers, dealers, chapmen, and co-partners, and traders, according to, and within the true intent and meaning of, the statutes concerning bankrupts then in force, and became indebted to certain persons in the sum of 100*l.* and upwards, and being such traders, and so indebted, committed acts of bankruptcy; that a fiat issued against them on the 16th of June, 1842, under which they were duly declared bankrupts; and that the now defendant, D. W. Acraman, A. J. Acraman, Holroyd, and Morgan, having duly surrendered and submitted themselves to be examined under the fiat, afterwards, and after the recovery of the judgment in the declaration mentioned, to wit, on, &c., obtained their certificates, which were duly allowed and confirmed by the court of Review. The plea then concluded with the same averment that the sixth plea concluded with, and with a verification.

To these several pleas the plaintiff demurred specially, assigning the following causes:

As to the second plea—that it was not competent to the defendant to plead to the declaration in this action, that no writ of *capias ad satisfaciendum* had been and was sued or prosecuted out of the court of Exchequer against the defendant and the said D. W. Acraman, A. J. Acraman, Holroyd, and Morgan, or any of them, and that notwithstanding such matter so pleaded, the plaintiff was entitled to recover in this action; that the defendant and the said D. W. Acraman, A. J. Acraman, Holroyd, and Morgan could and might and ought to have rendered themselves in the said action by and at the suit of the plaintiff, although no *capias ad satisfaciendum* had been issued; and that the second plea *379] *neither confessed nor avoided the matters alleged in the declaration.

As to the fourth plea—that, if the order in the fourth plea mentioned, which was made by COLERIDGE, J., as in the declaration mentioned, and authorized by him, were at any time open to any objection in point of practice, that the said order was made without any summons or notice, as in the fourth plea mentioned, such objection could only have been made the subject of proceedings in the court in which the judgment was given under which the render ought to have been made; that it must be presumed that COLERIDGE, J., had authority to make a valid order; that it was not essentially necessary that any summons or notice should have been made as a foundation for the said order, more especially as the order in the fourth plea mentioned was, and operated on service thereof itself, as a notice for the render in the fourth plea mentioned; that, if it were necessary, in point of practice, to issue a summons or give notice as in the fourth plea mentioned, the practice in such cases should have been specially stated; that the allegations in the fourth plea relate to

matters of practice, and ought not to have been stated in pleading; and that the fourth plea ought to have concluded to the country.

As to the fifth plea—that it appears in or by the declaration, that, so long ago as on the 12th of August, 1842, the plaintiff, by the consideration and judgment of the court of Exchequer, recovered against the defendant and the said D. W. Acraman, A. J. Acraman, Holroyd, and Morgan, the sums therein in that behalf mentioned, and that the defendant had not, nor had the said D. W. Acraman, A. J. Acraman, Holroyd, and Morgan, Bridges, and Ballantine, or any of them, paid or caused to be paid to the plaintiff the sums therein in that behalf mentioned, nor did the now defendant and *the said D. W. Acraman, A. J. Acraman, Holroyd, and Morgan, or any of them, render themselves or himself to the [*380 custody of the jailer of the court of Exchequer, according to the practice of the same court, or within any time, or in any manner, directed by the same court or any judge thereof, after judgment recovered in the said action, and yet it nowhere appears in and by the said fifth plea that the said sums, or any of them, have been paid, or that the said renders, or any of them, were or was made in due time, or that, by the said order of COLERIDGE, J., it was ordered that the defendant and the said D. W. Acraman, A. J. Acraman, Holroyd, and Morgan, should surrender themselves to the custody of the marshal of the Queen's prison within ten days after service of a copy of that order on them and on Bridges and Ballantine, which order was served as in the declaration mentioned, and which order was final as to the render of the defendants therein mentioned; and that it was only competent to the court of Exchequer sitting in Banco to have rescinded or altered that order; and that, before such court was held, the forfeiture of the condition in the declaration mentioned had occurred and did occur by the lapse of the ten days therein mentioned without any render having been made, and the defendant thereby became liable as in the declaration mentioned; that, if the last-mentioned order was not final, the payment or the render should have been made on the fifth day of Michaelmas term, 1842, according to the last order of CRESSWELL, J., made on the 2d of September, 1842; and the rule of the court of Exchequer made on the 4th of November, 1842, did not enlarge the time for the render of the defendant and of the said D. W. Acraman, A. J. Acraman, Holroyd, and Morgan, or in any manner dispense with the necessity of a render within the period mentioned in the last order of CRESSWELL, J.; that it was not competent to the *court of Exchequer to make such rule as in the said fifth plea mentioned, with- [*381 out the same being authorized by some course of practice of the said court; that there did not appear, in or by the fifth plea, any legal ground or reason for making the said rule, and that it did not appear, in or by the fifth plea, that, by the practice of the court of Exchequer, such a rule could be legally made, nor is the practice of the court of Exchequer in that behalf specially stated, as it should have been; that the fifth plea

was an argumentative mode of stating that the defendant and the said D. W. Acraman, A. J. Acraman, Holroyd, and Morgan had rendered themselves into custody; and that the fifth plea should have concluded to the country, and not to the court.

As to the sixth plea—that the bankruptcy and certificate of the defendant and the other persons in that behalf in the sixth plea mentioned, furnished no answer or defence to the facts and cause of action stated in the declaration, and that, notwithstanding the bankruptcy and certificate of the defendant, he was liable to pay the sum of money in the condition of the said writing obligatory mentioned, and so recovered as aforesaid, or make such render to custody as therein mentioned; that it was not expressed, nor did it appear, in or by the sixth plea, that the said D. W. Acraman submitted himself to be examined upon oath touching the disclosure and discovery of the estate and effects of the defendant and A. J. Acraman, or either of them, by and before the commissioners, or any of them; that it should have been distinctly and expressly averred that the said D. W. Acraman had been so examined upon oath touching the disclosure of the estate and effects of the defendant and the said A. J. Acraman and each and every of them; that it did not appear, in or by the sixth plea, that the defendant and A. J. Acraman submitted themselves *382] to be examined upon oath touching the disclosure and discovery of the estate and effects of the defendant and the said D. W. Acraman, or either of them, by and before the commissioners by the said fiat authorized, or any of them; and that the certificate in that plea mentioned was, by means of the premises, wholly void.

As to the seventh plea—that the facts stated in the said seventh plea constitute no answer or defence to the facts and cause of action stated in the declaration; that the said seventh plea amounts to a plea that another action was brought by the plaintiff against the defendant and the said D. W. Acraman, A. J. Acraman, Holroyd, and Morgan, and is pending, which is matter which, if pleadable, should have been pleaded in abatement and not in bar, and that a plea containing such matter should have concluded, not only with a verification, but with a prayer of judgment of the writ in this suit, and of the declaration thereon founded, and also a prayer that the same might be quashed; that the condition in the declaration mentioned is, for the payment by the now defendant and the said D. W. Acraman, A. J. Acraman, Holroyd, and Morgan, Bridges, and Ballantine, or any of them, or their or his heirs, executors, or administrators, to the plaintiff, of such sum or sums as should be recovered in any action or actions which had been at the time of the making of the said writing obligatory and condition, or which thereafter should be, brought for recovery of the said debt and costs, or render themselves as in the said condition is contained; and that it should have been specially stated how the action in the said seventh plea mentioned was pending at the time when the said seventh plea was pleaded.

As to the eighth plea—that the bankruptcy and certificate of the defendant and of the said other persons in that behalf in the said eighth plea mentioned, furnished no answer or defence to the facts and cause of action stated in the declaration, and that *notwithstanding the bankruptcy and certificate of the defendant, he was liable to pay the sum of money in the said condition mentioned, and so recovered as aforesaid, or make such render to custody as therein mentioned; that it did not appear in and by the said eighth plea, that the said D. W. Acraman ever submitted himself to be examined upon oath touching the disclosure and discovery of the estate and effects of the last-mentioned other bankrupts by and before the commissioners by the said fiat authorized, or any of them; that it should have been distinctly and expressly averred that the said D. W. Acraman had submitted himself to be from time to time examined upon oath touching the disclosure and discovery of the estate and effects of the said A. J. Acraman, Holroyd, and Morgan, and J. N. Franklyn, and each and every of them; that it did not appear in or by the eighth plea, that the now defendant and the said A. J. Acraman, Holroyd, and Morgan, submitted themselves to be examined upon oath touching the disclosure and discovery of the estate and effects of the now defendant, and of the said D. W. Acraman and Franklyn, or any of them, by and before the commissioners by the said fiat authorized, or any of them; and that the certificate in that plea mentioned was by means of the premises wholly void. [*383]

The defendant joined in demurrer. The case was argued in the last Michaelmas term.(a)

Sir *T. Wilde*, Serjt., (with whom was *Manning*, Serjt.,) in support of the demurrers.(b) The principal question to be argued in this case arises upon the demurrer to the second plea, which presents for the *consideration of the court the construction to be put upon the 1 & 2 [*384] Vict. c. 110, s. 8.(c) The second plea proceeds upon the supposition that

(a) Before Tindal, C. J., and Coltman, Maule, and Erle, Js.

(b) The points marked for argument on the part of the plaintiff, were substantially a repetition of the causes of demurrer specially assigned.

(c) Which enacts, “that, if any single creditor, or any two or more creditors, being partners, whose debt shall amount to 100*l.* or upwards, or any two creditors whose debt shall amount to 150*l.* or upwards, or any three or more creditors whose debts shall amount to 200*l.* or upwards, of any trader within the meaning of the laws now in force respecting bankrupts, shall file an affidavit or affidavits in her majesty’s court of Bankruptcy, that such debt or debts is or are justly due to him or them respectively, and that such debtor, as he or they verily believe, is such trader as aforesaid, and shall cause him to be served personally with a copy of such affidavit or affidavits, and with a notice in writing requiring immediate payment of such debt or debts; and if such trader shall not, within twenty-one days after personal service of such affidavit or affidavits, and notice, pay such debt or debts, or secure or compound for the same to the satisfaction of such creditor or creditors, or enter into a bond, in such sum and with such two sufficient sureties as a commissioner of the court of bankruptcy shall approve of, to pay such sum or sums as shall be recovered in any action or actions which shall have been brought or shall thereafter be brought for the recovery of the same, together with such costs as shall be given in the same, or to render himself to the custody of the jailer of the court in which such action shall have been or may be brought, according to the practice of such court, or within such time and in such manner as the said court, or any judge thereof, shall direct, after judgment

no forfeiture of a bond given under that statute could take place until the issuing of a *capias ad satisfaciendum*. That, however, is a fallacy. The bond under the statute is not like a recognisance of bail: it is not a proceeding in the cause. It was formerly taken for granted, that, in the case of bail, the *ca. sa.* was required by the *practice* of the court. But, when the matter came to be discussed and considered, a different determination prevailed. In *Sandon v. Proctor*, 7 B. & C. 800, to *scire facias* *385] on a recognisance of bail, *the defendant pleaded no *ca. sa.* duly issued, lodged, and returned; the plaintiff replied a *ca. sa.* issued, and returned *non est inventus*; and a rejoinder that the *ca. sa.* did not lie in the sheriff's office four days exclusive of the day it was lodged, the return day, and an intervening Sunday, was held bad on special demurrer. BAYLEY, J., there says: "The question in this case is, whether it is an answer to an action on the recognisance, for the bail to say that the *capias ad satisfaciendum* sued out against the principal had not lain in the sheriff's office for that period of time which by the rule of court it ought to have done to charge the bail." And, after referring to *Elliott v. Lane*, 1 Wils. 334, *Powell v. Taylor*, (a) and *Cherry v. Powell*, 1 D. & R. 50, for the purpose of showing that the irregularity complained of was not pleadable, the learned judge adds: "But it is insisted that the suing out of a *ca. sa.* against the principal is rendered necessary only by the rules and practice of the court, and that, as the omission to sue out a *ca. sa.* is a good plea, the matter stated in the rejoinder may also be pleaded. But it seems to me that the obligation to sue out a *ca. sa.* results by law from the terms of the recognisance. The language of the condition of the recognisance is, 'if the principal shall not pay the damages, or render himself.' The latter words 'or render himself' have been construed to import that the principal is to render in discharge of his bail only when the plaintiff has, by suing out a *ca. sa.*, intimated an intention to take the body of the defendant." And LITLEDALE, J., says: "It is insisted that the suing out a *ca. sa.* against the principal, in order to fix the bail, is required only by the rule or practice of the court. I am of opinion that that is rendered *386] *necessary by the recognisance. The condition of the recognisance is, that the defendant shall pay the damages, or render himself. Now, if this had been a common contract, the principal would be bound to render within a reasonable time after the judgment; but, inasmuch as the object of the recognisance is, to secure to the plaintiff in the action satisfaction of his judgment, it has been construed with reference to that object; and, as the plaintiff may, at his election, sue out execution either against the property or the person of the defendant, the condition has been held to be satisfied if the principal be rendered within a

shall have been recovered in such action, every such trader shall be deemed to have committed an act of bankruptcy on the 22d day after the service of such affidavit or affidavits and notice, provided a fiat in bankruptcy shall issue against such trader within two calendar months from the filing of such affidavit or affidavits, but not otherwise."

(a) Cited Tidd's Practice, 9th edit. 1129.

reasonable time after the plaintiff has notified his intention to have execution against the person of the defendant. As long ago as the 38 Eliz., it was held that the render required in the recognisance was to be intended a render upon process awarded. The suing out of the process, therefore, is not a matter required by any rule or practice of the court, but by the recognisance, and on that ground it is a good plea that no *ca. sa.* issued. But the recognisance does not require that the *ca. sa.* shall remain in the sheriff's office four days exclusive of the return-day and an intervening *Sunday*. An allegation that it has not remained for that time in the sheriff's office, shows that the party has broken a rule of the court, but not that the condition of the recognisance is satisfied." The recognisance of bail, being a proceeding in the cause immediately under the cognisance of the court, was peculiarly subject to its control and discretion: and accordingly the courts have said, that, though the words of the recognisance are absolute, the meaning is that the defendant shall render at the return of the *ca. sa.* This, however, is the case of a bond required by the legislature to be given in a certain form. Referring to the language of the statute, and to that of the bond itself, it will be seen that there is another mode in *which the plaintiff may give notice of his election [387 to require a render, viz. by a judge's order, which gives every intimation of that which it was the sole object of the *ca. sa.* to give. [TINDAL, C. J. The condition is, that the principal debtors shall pay, or render according to the practice of the court, or according to a judge's order. The question is, whether the words "according to the practice of the court" do not mean, according to the old recognised course, by *ca. sa.*] A defendant must always render according to the practice of the court, whether a *ca. sa.* issues or not: it was not necessary that the legislature should describe where the party should go, and what he was to do, to make a render. The *ca. sa.* was considered necessary because the construction put by the courts upon the recognisance of bail was, that it was an obligation on the part of the bail to render their principal, if the plaintiff should require a render; and the only way the plaintiff had of intimating his election was, by issuing a *ca. sa.* There can, however, be no reason for so construing this statutable recognisance, which may exist before any suit is in existence, and consequently before the court has a scintilla of jurisdiction. It is plain that the statute contemplated a render different in point of form from that under a recognisance of bail. Under the old practice, the courts were in the habit of extending the time for the defendant to render, where he was so ill that he could not be safely moved, or where he had become bankrupt, and was required to be examined at some distant place, and in various other cases. A render "according to the practice of the court" does not import all the practice of the court on the subject, but only the *form* and the *place* of render. The sureties in a bond under this statute cannot render the defendant; they would be guilty of a trespass if they did so:

*388] notice to the sureties, therefore, is immaterial. [MAULE, J. *In *Owston v. Coates*, 10 Ad. & E. 193, the court of Queen's Bench decided that the sureties might discharge themselves by a render of their principal.] The point presented for the consideration of the court in that case was, whether, the bond being for a render of the principal "according to the practice of the court, or within such time and in such manner as the court, or any judge thereof, should direct, *after* judgment should have been recovered in the action," it was competent to him, in case of his sureties, to render himself *before* judgment. That being a summary application, there was no opportunity of questioning the decision. The necessity for issuing a *ca. sa.* clearly did not arise from the practice of the court, but from the construction of the recognisance, over which the court could undoubtedly exercise a greater degree of control than it can over the construction of an instrument not made under its authority, but under that of an act of parliament. *When* the party is entitled to render, depends upon the form of the bond: what is the proper course to be pursued in order to obtain a render, depends upon the practice of the court. The bond, not requiring a *ca. sa.*, but advertising to a render pursuant to a judge's order, evidently contemplates something to be done not according to the practice of the court. Every purpose of the *ca. sa.* is answered in a much more intelligible and efficient form by a judge's order. The issuing of a *ca. sa.* for the mere purpose of obtaining a return of *nihil*, is a proceeding not very reconcilable with the dignity of the court, and one that the court will be slow to apply to the case of a bond under this statute.

The fourth plea, in substance, states that the order of COLERIDGE, J., was made before the time for rendering the defendant and his partners *389] according to the practice *of the court had expired, and was made *ex parte*, and without any previous summons. The first ground of defence presented by this plea clearly fails; for, the plea does not show that the time for rendering would not have elapsed before the expiration of the time limited by the order for the render, and an order extending the time for rendering ought to be made before the time originally fixed for the render has elapsed. Here the party had abundant opportunity to save his bond, or to object to any irregularity. As to the order being *ex parte*, that clearly is no objection. If the object of the order be to intimate the plaintiff's election to have the body of the debtor, why should it not be *ex parte*, as the issuing of a *ca. sa.* is *ex parte*? This, however, is not the proper mode of objecting to the regularity of the order. All orders are treated as valid until set aside. Even an injunction, though irregularly obtained, is treated as regular until dissolved. Besides, assuming the order of COLERIDGE, J., to be void, the defendant and his partners failed to render pursuant to the orders of CRESSWELL, J., which are not objected to, and which were obviously obtained by the defendant.

The fifth plea also is bad. The time for rendering, as extended by the second order of CRESSWELL, J., was the fifth day of Michaelmas term. The rule nisi obtained on the 4th of November, had not the effect of further enlarging the time. On the fifth day of the term, therefore, viz. on the 6th of November, the condition of the bond was broken. Suppose an action had been brought upon the bond, in another court, between the last-mentioned day and the day on which the rule was made absolute, could that rule have been pleaded in bar? Clearly not. An order pronounced by one court has no operation upon another court. The bond having been forfeited, it was not competent to the court to cure the forfeiture by afterwards giving time.

*As to the seventh plea, it is only necessary to advert to the terms of the bond. The pendency of another action at any time is only matter in abatement. [*390]

The sixth and eighth pleas raise a more important question, viz., whether a certificate on a fiat issued after the making of the bond, but before the recovery of judgment in the action brought for recovery of the original debt, is a bar to this action on the bond. Here is a debt of 1650*l.* due from the defendant and his partners to the plaintiff. Under the provisions of an act of parliament, the debtors enter into a bond, with sureties, conditioned for the payment of such sum as shall be recovered in any action brought or to be brought for recovery of the alleged debt, or for the render of the principals. The plaintiff brings an action for his debt, and recovers judgment after the issuing of a fiat against his debtors. Under these circumstances, when does any right of action or claim arise to the plaintiff upon that bond? Clearly not until after the bankruptcy. The bankruptcy and certificate, therefore, cannot discharge the statutable security. In *Jameson v. Campbell*, 5 B. & Ald. 250, where a bond was given under the 4 G. 3, c. 33, s. 1, by a member of parliament, being a trader, and, after his bankruptcy, but before his certificate, judgment was obtained in the suit in which the bond was given, it was held that the bankruptcy and certificate were no discharge of the bond. So, here, the demand on the bond was not a debt provable at the time the fiat issued, and therefore is not discharged by the certificate. The alternative condition in the bond makes no difference in this respect.

Talfourd, Serjt., (with whom was *Keating*,) contra.(a) It will be con-

(a) The points marked for argument on the part of the defendant were as follows:—

“The defendant will contend, on the argument of this demurrer, that the second plea is sufficient, notwithstanding any of the objections made to it by the plaintiff; that, under the circumstances stated in the declaration, the bond could not have been forfeited unless a writ of *capias ad satisfaciendum* had been issued; and that the defence is one which the defendant has a right to plead, and the plea unobjectionable in form:

“That the fourth plea is good, notwithstanding the objections raised to it; that the right of action depends on the validity of the order of Coleridge, J.; that the fourth plea shows that order to be invalid, and not the sort of order which the law requires for the purpose of creating such a liability as it is sought to impose on the defendant; and that the defence is pleadable and sufficiently pleaded.

*391] tended on behalf of the defendant—first, *that no right of action could accrue on the bond until the issuing and return of a *ca. sa.*—secondly, that the order of COLERIDGE, J., cannot be supported, *392] inasmuch *as it shortened the time allowed by law for the render, and that a judge's order made *ex parte* could not limit, though it might extend, the time for rendering—thirdly, that, supposing that learned judge to have had authority to make the order he did, the jurisdiction of the court was not thereby exhausted; that the subsequent orders of CRESSWELL, J., were well made; and that the court of Exchequer had power, within the period limited by the second order of CRESSWELL, J., further to extend the time for rendering, and have by the rule of the 9th of November, the propriety of which this court cannot review, concluded the question—fourthly, as to the seventh plea, that there having been, at the time the bond was given, an action commenced, and which is still pending, no judgment has in fact been recovered *393] *in the action to which the bond referred, and consequently there has been no forfeiture of the bond—lastly, that, assuming the

“That the fifth plea is unobjectionable, and that the facts stated in it clearly show that the bond declared upon was never forfeited, whether the order of Coleridge, J., be treated as valid or invalid; and that the defence is pleadable, and sufficiently pleaded.

“That the sixth and eighth pleas are unobjectionable, and that the bankruptcy stated therein is a complete defence, pleadable as such, and sufficiently pleaded.

“And that the seventh plea is unobjectionable; that the condition of the bond could refer only to one action, which could only have been that depending at the time of its execution.

“The defendant will further contend, that the declaration is bad, for that it discloses no cause of action, and does not show that the bond declared upon was ever forfeited; that it is not stated in the declaration that the said D. W. Acraman, A. J. Acraman, Holroyd, and Morgan had notice of the recovery of the judgment mentioned in the declaration, or that the said judgment was such that the non-payment of the sum awarded by it could occasion a forfeiture of the bond; for that the declaration ought to have shown, either that the action in question was the only, or, at all events, that it was the first, action commenced for the said debt after the execution of the bond; that the order of Coleridge, J., stated in the declaration, appears to have been insufficient to occasion a forfeiture, inasmuch as it is stated to have been made on the application of the plaintiff; whereas, according to the true construction of the act of parliament, the power of making such an order is given for the benefit of the defendant; that the declaration is further objectionable for not showing that the time given by the order of Coleridge, J., did not expire before the time limited by the practice of the court, since, as the defendant contends, according to the true construction of the act a judge cannot shorten the time given by the practice of the court, although he may enlarge it; and, further, the declaration is bad, since it appears that the order was made by a judge of the Queen's Bench, in a cause pending in the Exchequer, and the declaration does not state, that, when he made it, he was acting as a Baron of the Exchequer, even supposing the statute which enables judges to act in each of the courts could have applied, which, however, as the defendant contends, it would not; that, as to the first order of Cresswell, J., it is not stated whether that was made before or after the time given by the order of Coleridge, J., had expired, but it is left wholly uncertain whether the plaintiff relies on the non-compliance with the order of Coleridge, J., as a forfeiture, or on the non-compliance with that of Cresswell, J.; that similar observations apply to the statement of the second order of Cresswell, J.; that the statement of the rule of the court of Exchequer leaves it altogether uncertain whether the bond was ever forfeited, for, by that rule, the defendants were to have a fortnight after judgment pronounced upon the rule, to render, but the declaration leaves it uncertain whether judgment has been pronounced on the said rule, or whether or what judgment; that, for aught that appears in the declaration to the contrary, the defendant may have been rendered, or may still be rendered, so as to prevent a forfeiture of the bond; and that it is impossible to understand on what the plaintiff relies as a forfeiture; so that the declaration is bad for ambiguity and uncertainty.”

bond to have been forfeited, the bankruptcy and certificate of the defendant afforded a complete answer to the action.

1. It may be conceded that the necessity for issuing a writ of *ca. sa.* did not depend upon a mere rule of practice, but upon the construction which the courts had applied to the recognisance of bail. The court is now asked to put the same judicial construction upon the same words occurring in the condition of this bond. Under the 6 G. 4, c. 16, s. 5, a party being arrested and remaining under arrest, without bail, for twenty-one days, thereby committed an act of bankruptcy. That provision was virtually abrogated by this statute, which abolished imprisonment for debt. The main object of the clause now under consideration, was, to provide a substitute for the act of bankruptcy under the 6 G. 4, c. 16, s. 5, giving the creditor the same privilege of coercing his debtor without incarceration, and the debtor the same extent of indulgence, in point of time, as he had before. It was at one time supposed that a distinction existed between the effect of the recognisance of bail in the court of King's Bench, and that in this court, and that, in the former, a *ca. sa.* was necessary, but not here: since the case of *South v. Gryffith*, Cro. Car. 481, however, that notion has no longer been entertained. In *Weddall v. The Manuporters of Jocar*, 10 Mod. 267, PARKER, C. J., said: "Rendering, is to be understood rendering upon demand, viz. at the return of the *capias*; for, then is the legal demand completed. Not rendering then, is refusal; and then the bail become liable, and not before. Pleading, therefore, the death of the principal before the return of the *capias*, is most certainly a good plea." *Wilmore v. Clerk*, 1 Lord Raym. 156, also shows that it is always matter of right to render at any time before the return-day of the *capias*. A render according to the practice of the court, therefore, is a render at the return of a *capias ad satisfaciendum*. [MAULE, J. Your argument is, that, in order to work a forfeiture of the bond, the plaintiff must think fit to have the body of the debtor, and fail to get it.] He must not only think fit to have the body, but he must adopt a particular course to show that he does so, that is, by suing out a *ca. sa.* [MAULE, J. Are you not now encountering the judgment of the court of Queen's Bench in *Owston v. Coates*? There could be no *ca. sa.* before judgment. It seems somewhat singular, therefore, that such a construction should be given to an act, the main object of which was to prevent imprisonment before judgment.] In that case, the application was made on behalf of the defendant. The court treats the bond given under this statute as analogous to a recognisance of bail. There is no reason why the court should, with reference to this security, resort to a different mode of construction from that which they have adopted in the case of the recognisance.

2. COLERIDGE, J., even assuming that the circumstance of his not being a judge of the court of Exchequer affords no ground of objection, clearly had no jurisdiction to make an order limiting, at the instance of

the plaintiff, the time for the defendant to render. A render under **that** order would not be a render according to the practice of the court, or within the scope and meaning of the act of parliament. It was made without summons, and without hearing the defendant. And, if that order wrought nothing, no estoppel can arise from the two subsequent orders of CRESSWELL, J.

*395] *3. The condition of the bond would be well performed if the defendant and his partners rendered according to the order of the court in which the action was brought. Supposing COLERIDGE, J., *had* jurisdiction to make the order he did, it will hardly be denied that it was competent to CRESSWELL, J., to extend the time for rendering. He did extend the time till the fifth day of Michaelmas term. Before the expiration of this extended period, the rule nisi mentioned in the declaration was granted by the court of Exchequer. By that rule all proceedings in the cause and against the sureties were stayed; meaning, of course, that no advantage should be taken of the non-render of the defendant and his partners within the time limited by the last order. That rule came on to be argued, according to the course and practice of the court of Exchequer, on the 24th of November, (as appears by the fifth plea,) when that court ordered that the defendant and his partners should have ten days' further time to render. That which this court is now asked to do, is, in effect, to sit as a court of error upon a decision of a court of co-ordinate jurisdiction upon a matter of practice—a course which even the House of Lords, in *Mellish v. Richardson*, 9 Bingh. 125, 2 M. & Scott, 191, 1 C. & F. 224, felt themselves incompetent to adopt. Each court has the exclusive regulation of its own practice, and of the exercise of its discretion.

4. The question raised by the seventh plea is, whether, an action having already been brought at the time of the execution of the bond,—which action is still pending,—it is competent to the plaintiff to apply the bond to an action he has since brought and proceeded in to judgment. A nonsuit in the first action, of course, would not prevent the plaintiff from commencing another; and to such second action the bond would *396] apply. But the party is not to be permitted to bring an *indefinite number of concurrent actions. And it is a misapprehension to suppose that this is mere matter of abatement: for, unless the judgment is recovered in the action to which the bond applies, the bond is not forfeited.

5. The only remaining question is that which arises upon the sixth and eighth pleas, viz., whether the certificate which the defendant has obtained since the recovery of the judgment, is a bar to the present action. Whatever might be the state of the law at the time the case of *Jameson v. Campbell*, 5 B. & Ald. 250, was decided, since the 6 G. 4, c. 16, a different principle applies. In *Dinsdale v. Eames*, 2 B. & B. 8, 4 J. B. Moore, 350, the defendant in an action on a bail-bond (given in an action of debt

against himself) becoming bankrupt between plea and verdict in the action on the bail-bond, and obtaining his certificate after judgment, was held to be discharged from the damages and costs; and DALLAS, C. J., said: "The debt was contracted with certainty before the bankruptcy, and therefore might have been proved under the commission." [MAULE, J. The case of *Jameson v. Campbell* was decided at a time when sureties could not prove under the commission against their principal. Now they may, (6 G. 4, c. 16, s. 52.) The principal ground, therefore, of that decision, is removed.] *Dinsdale v. Eames* was recognised in *Littlewood v. Crowther*, 3 D. & R. 533. There, the defendant having been arrested on the 27th of March, on a writ returnable the 16th of April, became bankrupt on the 3d of April, and obtained his certificate on the 26th of June; and it was held, that, as the bankruptcy took place before the bail-bond was forfeited, the debt was provable under the commission, and consequently the bail were discharged. This was a debt payable upon a contingency provable under the 6 G. 4, c. 16, *s. 56, which enacts, "that, if any bankrupt shall, before the issuing of any commission, have contracted [*397 any debt payable upon a contingency which shall not have happened before the issuing of such commission, the person with whom such debt may have been contracted, may, if he think fit, apply to the commissioners to set a value upon the debt," &c. [TINDAL, C. J. What contingency is there here upon which the commissioners could put a value?]

Sir T. Wilde, Serjt., in reply. The statute 1 & 2 Vict. c. 110, had two principal objects in view—first, the abolition of imprisonment for debt before judgment, except under special circumstances—secondly, to give facilities to creditors in getting at the property of their debtors becoming bankrupt. In *Hayward v. Heffer*, 5 Q. B. 398, the plaintiff had made an affidavit of debt under the statute of 1 & 2 Vict. c. 110, s. 8, against one Hales, and Hales had entered into a bond with sureties, conditioned to pay such sum as should be recovered against him in an action on the debt, or to render himself; an application was made, on the part of the sureties, that the bond might be delivered up to be cancelled, upon a suggestion that Hales, the principal debtor, had rendered; and, for this purpose, *Owston v. Coates* was relied on; PATTESON, J., asked, "What power have we over the bond itself?" And per Lord DENMAN, "Why are we to deal with this bond otherwise than with any other bond alleged to be satisfied?" And, upon its being suggested by the attorney-general that the court would order a bail-bond to be cancelled, and that the case under discussion was like the case of bail to the action; PATTESON, J., said: "There the recognisance is the creature of the court: here, the giving of the security is directed by a statute." And the court *held that they had no authority to make the order. That case [*398 expressly recognises the distinction for which the plaintiff in this case contends. *Sandon v. Proctor*, 7 B. & C. 800, (a) decided that the

(a) And see *Elliott v. Lane*, 1 Wils. 334; *Cherry v. Powell*, 1 D. & R. 50.

ca. sa. was not required by the *practice* of the court, but by the construction the court had thought fit to put upon the recognisance of bail; introducing an implied condition that the principal should render if called upon, and if called upon in a particular mode, viz. by the issuing of a *ca. sa.* The only object of the *ca. sa.* was to fix the sureties. And there can be no sound reason for putting the same construction upon these bonds that was put upon the recognisance. The analogy between sureties in a recognisance of bail, and sureties in a bond under this statute, fails in many respects; for instance, bail may render their principal; the sureties in a bond under this statute, we have seen, cannot. [COLTMAN, J. At what period do you say the render should be made?] Seeing what was the main object of the statute, the render could not be *before* judgment, but probably would be required to be made within a reasonable time *after*. The statute requires the court to make a practice upon the subject. [MAULE, J. That is not consistent with the case of *Owston v. Coates*, where the render was *before* judgment.] That was not the case of a render within the terms of the bond; and the attention of the court was not particularly called to the various provisions of the statute. The condition being, to render the principal or pay the debt, if the sureties cannot render, they must perform the other alternative.

The supposed irregularity of the order of COLERIDGE, J., is no ground of plea, but should have been the subject of a summary application to the court of Exchequer. The orders made by CRESSWELL, J., enlarging the time to render, clearly are unexceptionable. The obvious meaning *399] *of the fourth plea is, that, inasmuch as no *ca. sa.* had issued, the time for the render of the principal according to the practice of the court, had not expired. If no *ca. sa.* was necessary, the plea fails.

The fifth plea, which relies on a render made under the rule of court, on the 24th of November, affords no defence. A render after the bail were fixed, was no render in point of law.

Bail cannot plead the bankruptcy and certificate of their principal in their own discharge: *Donnelly v. Dunn*, 2 B. & P. 45. Then, is the certificate a discharge of the defendant's liability on this bond? That depends upon whether this was a demand provable under the fiat. The only sections of the 6 G. 4, c. 16, that can by possibility apply, are the fifty-first, the fifty-second, and the fifty-sixth. This is not a debt upon credit, and therefore s. 51 is out of the question: and s. 52 applies to sureties only; this is an action against the principal. If provable at all, it must be under s. 56, which enables parties to prove in respect of debts payable upon a contingency. To bring a case within this clause, the debt must be due at the time, and payable upon a contingency that is susceptible of valuation. [MAULE, J. If the contingency is susceptible of calculation, it is presently valuable, and therefore provable.] Assuming that to be so,—though it may be doubtful,—still the contingency must be capable of valuation; which this is not. [MAULE J. Would you exclude

the case of a debt payable at the expiration of ten years, or on the death of A., whichever should first happen?] No. There, the only contingency would be the *time* of payment. [MAULE, J. I should say the clause embraces the case of a demand the value of which may be calculated, though the event on which it is payable may never happen; the case of a *post-obit*, for instance.] It would *be difficult to con- [*400
tend that a *post-obit* would not be provable. Here, however, the bond admits no antecedent debt; it creates no debt. How, then, can its *value* be ascertained? It is the existence of the debt, not the amount or the time of payment, that is contingent. The bond is in the like terms with that in *Jameson v. Campbell*, 5 B. & Ald. 250, with the addition of the alternative as to render, which cannot make any difference in this respect. A bail-bond not forfeited until after the bankruptcy, clearly does not create a provable debt. In *Attwood v. Partridge*, 4 Bingh. 209, 12 J. B. Moore, 431, the defendant covenanted with the plaintiffs for the due payment by R. of the annual premium on a policy effected on the life of R., and transferred by R. to the plaintiffs by way of security for a debt due from him to them; the defendant became bankrupt *before*, and obtained his certificate *after*, a default by R.; and it was held that the defendant was not discharged from liability for the premium, which the plaintiffs had been obliged to pay to keep the policy on foot. How could the commissioner in this case say whether the plaintiff would ever recover a judgment in the action, or when, or to what amount? There is, moreover, the incalculable contingency of a render. *Cur. adv. vult.*

TINDAL, C. J., now delivered the judgment of the court.

This was an action upon a bond entered into in pursuance of the statute 1 & 2 Vict. c. 110, s. 8.

The declaration set out the bond and the condition, by which, after reciting that the plaintiff had made an affidavit that a debt of 1650*l.* was due to him from the defendant and his partners, who were traders within the bankrupt laws, and further reciting that the plaintiff *had, on [*401
the 23d and 24th of March, 1842, caused the defendant and his partners to be served with a copy of the affidavit, and with a notice requiring immediate payment of the debt; also reciting that James Oxley and Joseph Arthur Ballantine had agreed to join the defendant and his partners in the said writing obligatory, subject to the condition for making the same void, as sureties for the defendant and his partners—the condition was declared to be, that, if the defendant and his partners, or Oxley and Ballantine, or any of them, should pay such sums as should be recovered in any action which had been, or should be, brought for recovery of the said debt; or if the defendant and his partners should render themselves to the custody of the court in which such action had been, or might be brought, according to the practice of such court or courts, or within such time and in such manner as the said court or courts, or any judge thereof respectively, should direct, after such judgment should have

been recovered in such action or actions; then the writing obligatory should be void. The declaration then stated that, after the making of the writing obligatory, an action was commenced by the plaintiff against the defendant and his partners in the court of Exchequer, in which the sum of 1698*l.* 6*s.* was adjudged to the plaintiff for his damages and costs, of which the sum of 1650*l.* is the debt in the condition mentioned, and 33*l.* 11*s.* 6*d.* is for interest, and 14*l.* 13*s.* 6*d.* costs of suit; of all which the defendant had notice. The declaration further states that neither the defendant nor his partners, nor the sureties, paid the sum recovered, or any part of it. It further states that, after the recovery of the judgment, by an order of COLERIDGE, J., made on the application of the plaintiff, it was ordered that the defendant and his partners should surrender themselves to the custody of the marshal of the Queen's prison, *402] within ten days after *service of a copy of the order, a copy whereof was afterwards, to wit, on the 20th and 23d of August, served on the defendant and his partners; and that ten days from the service of that order had elapsed before the commencement of the suit. The declaration further states, that, afterwards, to wit, on the 26th of August, 1842, CRESSWELL, J., made an order, by which it was ordered that the time for the defendant and his partners to render should be enlarged for a week, and that the further hearing of a summons for setting aside the order of COLERIDGE, J., should be adjourned until the 2d day of September, 1842. The declaration further states, that, on the 2d of September, 1842, an order was made by CRESSWELL, J., by which it was ordered that the time for surrendering the defendant and his partners should be enlarged until the fifth day of Michaelmas term, without prejudice to the right of the bondsmen to render the defendant and his partners in the mean time, or to the right of the plaintiff to treat the bond as forfeited. The declaration further states, that, afterwards, to wit, on the fourth day of Michaelmas term, by a rule of the court of Exchequer made in the last-mentioned action, it was ordered that the plaintiff should show cause on Wednesday, the 9th day of November, why the order of COLERIDGE, J., and all proceedings had thereupon, should not be set aside, with costs, to be paid by the plaintiff, together with the costs of the proceedings before CRESSWELL, J., in relation to the said order, and of that application, or why the defendants (meaning the defendants in the last-mentioned action) should not have a fortnight after judgment pronounced on that rule, or such other time as the court should order in that behalf, to render themselves into custody as to the last-mentioned action, in discharge of their bail; and why all proceedings on the bond should not be *403] set aside, with costs; and that, in the mean time, all *proceedings in the last-mentioned cause and against the defendant's bail, should be stayed. The declaration further states, that neither the defendant nor his partners, nor any of them, rendered themselves to the custody of the jailer of the court of Exchequer according to the practice of the

same court, or within the time mentioned in the said orders, or any of them, after judgment had been so recovered as aforesaid, or within any other time, or in any manner lawfully directed by the same court, or any judge thereof, after judgment had been so recovered as aforesaid, according to the form and effect of the condition.

To this declaration, the defendant pleaded several pleas; some of which form the subject of demurrers.

The second plea is, that, after the recovery of the judgment, and before the commencement of this suit, no writ of *capias ad satisfaciendum* was sued or prosecuted out of the court of Exchequer against the defendant and his partners, or any of them; and, the plaintiff having demurred to this plea, the first question in the cause is, whether this plea furnishes an answer to the declaration.

It has been settled by various decisions, that, to a *scire facias* on a recognisance of bail, it is a good plea that there was no writ of *capias ad satisfaciendum* issued against the principal: *Sandon v. Proctor*, 7 B. & C. 800; *South v. Griffith*, Cro. Car. 481; *Weddall v. The Manucaptors of Jocar*, 10 Mod. 267; *Wilmore v. Clerk*, 1 Lord Raym. 156. The necessity for a *capias ad satisfaciendum* did not rest on a mere *rule of practice*, but was the construction put *by law* on the terms of the recognisance; for, as was said in the case of *Wilmore v. Clerk*, 1 Lord Raym. 156, "the condition of the recognisance is, that, if the defendant is condemned in the action, he shall pay the condemnation or render his body to prison. The *question will then be, at what time the render ought to be. [*404

And the law says it ought to be when the plaintiff in the original action has signified that he will sue execution against the body, which he does by suing of the *capias ad satisfaciendum*." But it was contended on behalf of the plaintiff, that, although the rule was established with reference to a recognisance of bail, it ought not to apply to a bond under the statute 1 & 2 Vict. c. 110, s. 8; that a recognisance of bail was an instrument peculiarly under the control of the courts, which had put an arbitrary construction upon it, not entirely consistent with the natural import of its terms. But, even if this were admitted to be so, still such is the established construction of the recognisance; and, as the bond directed to be given under the statute of Victoria is evidently penned in analogy with, and nearly in the terms of the recognisance of bail, and as the terms of the latter have obtained a judicial signification, we see no reason to doubt that the words of the bond were intended to bear the same sense. Nor are the words which follow—"according to the *practice* of the court"—so immaterial as they were represented by the plaintiff's counsel; for, although the necessity for the issuing of a writ of *capias ad satisfaciendum* is not, strictly speaking, a mere matter of *practice*, but is required by a *rule of law*, yet a render made upon the issuing of such a writ falls aptly within the description of a render to the custody of the jailer of the court according to the *practice of the court*; and, as the words in question ob-

viously refer to some recognised course of practice,(a) it is not easy to see what other practice the *statute can intend to refer to than that which actually prevailed in case of a recognisance of bail. We think, therefore, the second plea is a good answer to the action.

The defendant further pleaded, fourthly, that the order of COLERIDGE, J., was made before the time for rendering the defendant and his partners according to the practice of the court, had expired, and was made *ex parte*, and without any previous summons. The plaintiff has demurred, and we think the plea is bad. It seeks to invalidate the order of COLERIDGE, J., on two grounds: first, because the time for rendering had not elapsed when the order was made; but it is quite consistent with the plea, that the time for rendering would have expired before the time limited by the order for the defendant and his partners to render; and, if any order is made which operates to extend the time for rendering, such an order ought to be made before the time had expired for rendering. The second *406] ground of *objection, that the order was made *ex parte*, and without a summons, is also of no weight. The remedy for a defect in an order, if any exists, is, by application to the court to set aside the order: but, until it is set aside, the order cannot be treated as a nullity. It is a further objection to this plea, that, even if the order of COLERIDGE, J., is void, the defendant shows no justifiable cause, on this plea, for not rendering pursuant to the practice of the court, or to the orders of CRESSWELL, J. The plaintiff, therefore, is entitled to succeed on this demurrer.

The defendant has further pleaded, fifthly, that the order of COLERIDGE, J., was made before the time for rendering the defendant and his co-partners had expired; and that, before the expiration of ten days from the service of the order of COLERIDGE, J., the first order of CRESSWELL, J., was made; and that, before the expiration of the time mentioned in the last order, the second order of CRESSWELL, J., was made; and that, before the fifth day of the next Michaelmas term, the rule of the court of Exchequer in the declaration mentioned, was made; and that, after the making

(a) *Quere*, whether the words, "according to the practice of the court," necessarily refer to an existing practice rather than to a practice to be established in *futuro* for the regulation of a novel species of security; and whether, supposing the legislature, in using these words, to have contemplated an existing practice, they were used with reference to any one certain or particular practice. The courts in which the bonds directed to be given by the 1 & 2 Vict. c. 110, s. 8, may be put in suit, as well as those in which actions for the recovery of the original debts, in respect of which such bonds are given, may be brought, have different systems of practice, though the diversity with respect to the practice of the superior courts is not so great as it formerly was. The actions for the recovery of the original debts may indeed be brought in inferior courts, in which no *ca. sa.* can issue; many of which courts, as those of London, Oxford, Bristol, &c., have jurisdiction to an unlimited amount.

It seems to be imposing a forced construction upon the language of a statute, to hold that by "the practice of the court," the legislature must be understood to mean, something which is not matter of practice, but matter of law.

But, even treating the issuing of a *ca. sa.* in proceedings upon a recognisance of bail, as "matter of practice," within the meaning of the above statute, such practice is confined to proceedings against the bail, and does not apply to proceedings against the principal, who, though made a joint and several obligor in bonds given under the eighth section of this act, as well as in bail-bonds, is no party to the recognisance of bail.

of the last-mentioned rule, and within a reasonable time for that purpose, notice of the said rule was given to the plaintiff as by the same directed, and according to the practice of the court; that afterwards cause was shown according to the course and practice of the court; that thereupon the court did, by a certain rule duly made, according to the course and practice of the said court, order and direct that the defendant and his partners and their bail or sureties should have ten days from the day of the making of the said rule to render the defendant and his partners; and that within the time so limited the defendant and his partners rendered themselves to the custody of the jailer of the court.

The plaintiff demurred to this plea, on the ground *that the order of CRESSWELL, J., only gave time to the defendant and his partners to render until the fifth day of Michaelmas term, and that the rule nisi of the court did not give any extended time for the render; and it was contended that, on the fifth day of Michaelmas term, the condition was broken, and a right of action vested in the plaintiff. But it appears to us, that, as when the rule nisi was granted, it was competent for the court under the act of parliament to grant an extended time for the render, the court in granting the rule to show cause why the time should not be extended, preserved their jurisdiction entire, and retained the right of making an order for an extension of the time, in the same state as they possessed it when they granted the rule nisi. (a) It seems to us, therefore, that the defendant is entitled to judgment on this plea. [*407]

*The sixth plea sets up, in answer to the declaration on the bond, a certificate in bankruptcy on a fiat issued after the making of the writing obligatory, but not appearing to have been issued after the recovery of judgment in the action brought for the recovery of the original debt. The plea not stating the fiat to have issued *after* the recovery of the judgment, it must, in deciding on the validity of the plea, be assumed that the fiat issued *before* the recovery. The original debt in this case is undoubtedly barred; but it will not follow as a necessary consequence, that a bond given to secure the payment of the debt will be also barred: [*408]

(a) The question seems to have been, not whether the court of Exchequer, on the 4th of November, 1842, possessed the power of further extending the time for making the render, which then stood enlarged to the fifth day of Michaelmas term, the 6th of November, 1842, but whether that power was effectually exercised. This might have been done by giving time to render until the rule should have been disposed of. But, although the court of Exchequer granted a stay of proceedings in the original action and against the bail, the rule contained no provision with respect to the *time of render*, a matter wholly collateral to the proceedings in the original action, and to any proceedings against the bail, and not—as was probably supposed by those who drew up the rule—consequent or dependent upon the proceedings in that court. The defendant might have applied to the court to amend the rule by supplying the omission. By the terms of the condition of the bond, the render was to be made within such time and in such manner as the court or a judge should direct. There existed a valid order for a render to be made on or before the 6th of November, without prejudice to the right of the bondsmen to render the defendant and his partners in the mean time, and that day was suffered to pass without a render, and without any rule or order for a further extension of the time.

No power appears to be given to the courts "to preserve their jurisdiction entire," otherwise than by appointing a time for the render.

for which *Jameson v. Campbell*, 5 B. & Ald. 250, (a) is in point. We must, therefore, look to the provisions of the 6 G. 4, c. 16, to determine the point.

The certificate is, by s. 126 of that act, a bar to all debts and demands made provable against the bankrupt. And the question will be, whether this bond is provable under the fiat. The only sections under which it can be provable, are, the 51st or the 56th sections. By the 51st section, persons who have given credit to the bankrupt for any money or other matter or thing, which shall not have become payable when the bankrupt committed an act of bankruptcy, whether such credit shall have been given upon any bill, bond, note, or other negotiable security, or not, shall be entitled to prove such bill, bond, note, &c., as if the same were payable presently, and receive dividends equally with the other creditors, deducting only a rebate of interest, to be computed from the declaration of a dividend, to the time such debt would have become payable. This section, as far as it relates to bonds, is to the same effect as, and nearly
 *409] in the terms of, the statute 7 G. 1, c. 31, *s. 1, by which bonds, though not presently payable, were admitted to be proved; and it has been decided, upon the construction of that statute, that a bond conditioned for the payment of money on the happening of an event at a future uncertain period, could not be proved: *Ex parte Barker*, 9 Ves. 110: and it appears to us that the same rule must apply to the 51st section of 6 G. 4, c. 16. In the present case, it is not only uncertain at what time any debt will be due on the bond, but also whether a debt will ever become due; as it is uncertain whether the condition of the bond will be broken. This debt, therefore, is not provable by virtue of the 51st section.

The 56th section provides, that, if any bankrupt shall, before the issuing of the commission, have contracted any debt payable upon a contingency which shall not have happened before the issuing of such commission, the person with whom such debt has been contracted may, if he think fit, apply to the commissioners to set a value upon such debt; and the commissioners are required to ascertain the value thereof, and to admit such person to prove; or, if the value shall not be so ascertained before the contingency shall have happened, then such person may, after such contingency shall have happened, prove in respect of such debt, provided he had not notice, when such debt was contracted, of any act of bankruptcy by the bankrupt committed.

In the construction of this section a distinction has been taken, (in the case of *Ex parte Marshall*, 1 Mont. and Ayr. 145, cited and relied upon by ERSKINE, J., in *Abbott v. Hicks*, 5 N. C. 578, 7 Scott, 733,) between contingent liabilities which may never become debts, and debts payable on
 *410] a contingency; and it has been held, that the latter only are provable under the *commission. The present case, although

(a) And see S. C., in error, 1 Bingh. 320, 8 J. B. Moore, 281, 12 Price, 341; *Hunter v. Campbell*, 3 B. & Ald. 273, 1 Chitt. R. 731.

in form a case of debt on bond, yet the bond being defeasible on performance of the condition, it is, in substance, not the case of a contingent debt, but a contingent liability. At the time when the fiat issued, it was quite uncertain whether any debt would ever arise upon the bond; it was at that time a liability which would not become a debt, unless the condition were broken. It appears to us, therefore, that judgment should be for the plaintiff on the demurrer to the sixth plea, and also on that to the eighth, which does not raise any other question than that raised by the sixth plea.

The seventh plea states, that before the giving of the bond, an action was commenced by the plaintiff against the defendant and his partners, for the recovery of the same identical debt in the condition mentioned, and that this action, until and at the time of making the writing obligatory, and from thence hitherto, hath been and still is pending, and that the plaintiff could and might have recovered in the said action the said debt; and that, at the time of the making of the writing obligatory, the action in the declaration mentioned had not been commenced; and that the writing obligatory was meant and intended by the several parties thereto to apply, and did apply, to the action so commenced by the plaintiff as in the said plea mentioned, and was not by the said parties, or any of them, meant or intended to apply, and did not apply, to the action so commenced, and in which judgment was so obtained, as in the declaration mentioned.

The plaintiff has demurred to this plea, and it seems to us that the plea is bad. What the parties meant and intended, and to what action the bond applied, must be collected from the terms of the condition; and no averment can be taken to contradict what appears on the face of the instrument. The condition is, to pay such *sums as should be recovered [411 in any action which then had been, or thereafter should be, brought for the recovery of the debt; and it is in direct contradiction of the terms made use of, to aver that the bond applied only to the sum to be recovered in an action before then brought.

We think, therefore, that this plea also is bad, and that judgment should be given for the plaintiff on the demurrer thereto.

Judgment accordingly. (a)

(a) See this case reported, post Vol. III., upon a motion as to entering up the judgment See also *Hayward v. Bennett*, post, T. V. 1846, *Kymer v. Sydeserf*, 4 M. & G. 636, 5 Scott, N. R. 193. In *Geikie v. Hewson*, 4 M. & G. 618, 5 Scott, N. R. 484. The plaintiffs on the 1st of February, 1842, commenced an action against Gale and Gale, to recover the amount of a bill of exchange for 468*l.* 1*s.* 9*d.*, and also a large sum for goods sold and delivered, money paid, and money due upon an account stated. They afterwards filed an affidavit in the court of bankruptcy, under the 1 & 2 Vict. c. 110, s. 8, alleging G. and G. to be indebted to them in 468*l.* 1*s.* 9*d.*, for which sum G. and G., on the 11th of February, gave a bond, with sureties, pursuant to the statute. On the 21st of March, the plaintiffs signed judgment against G. and G., (against whom a fiat in bankruptcy had issued,) for 1332*l.* 19*s.* 6*d.*, which included the 468*l.* 1*s.* 9*d.* On the 5th of April, the plaintiffs proved their debt under the fiat, excluding the amount of the bill of exchange in respect of which the bond had been entered into: on the 12th of April they lodged a *ca. sa.* against G. and G., and on the 30th of May commenced

actions against the sureties upon the bond. It was held that the proof under the fiat was an election to relinquish the action against G. and G.; and that, the principal debtors being thus entitled to be discharged, if rendered pursuant to the condition of the bond, the sureties were entitled to summary relief on motion.

*412] *ROBERTSON v. G. L. JACKSON and Others. Dec. 23.

By a charter-party, A., the owner, agreed that the ship should proceed to the Tyne, and there load a cargo of coals, and proceed therewith to Algiers, and deliver the same there, on payment of certain freight. B., the charterer, engaged that the vessel should be unloaded at a certain average rate per day; and that, if detained for a longer period, he would "pay for such detention at the rate of 5*l.* per diem, to reckon from the time of the vessel being ready to unload, and in turn to deliver."

According to the general regulations of the port of Algiers, vessels may commence unloading as soon as they enter within the mole; but, by a special regulation of the French government, coals destined for the use of the marine department are required to be unladen at a particular spot, and in a given order:—

Held, that evidence was admissible to show that the words "in turn to deliver" had by the usage of the particular trade acquired a known meaning in reference to this special regulation with respect to coals for the use of the French marine department, although A. was not cognisant of the fact of the coals having been shipped under a contract with the French government; but that the testimony of three or four witnesses, speaking to a course of business that had only grown up within about five years, and with reference to charter-parties the language of which was not identical with that of the charter-party in question, was insufficient to establish such general usage.

Held, also, that the special regulation as to the unloading of coals for the French marine department, was to be considered one of the regulations of the port, binding upon all vessels entering the port.

INDEBITATUS assumpsit, for the use of a certain vessel of the plaintiff on demurrage. Plea, non assumpsit.

The cause was tried before TINDAL, C. J., at the sittings at Guildhall after last Hilary term. The plaintiff, it appeared, was a merchant and ship-owner residing at Pembroke, in South Wales; the defendants are ship and insurance brokers in London, carrying on business under the firm of G. L. Jackson & Sons. On the 10th of December, 1841, the following memorandum of charter was entered into between the parties:

"Memorandum of charter-party. It is this day mutually agreed between W. Robertson, owner of the good ship or vessel called the Cambria, of the burden of 347 tons register measurement, or thereabouts, now in the port of
*413] London, and G. L. Jackson & Sons, of *London, as agents, that the said vessel, being tight, staunch, and strong, and every way fitted for the voyage, shall, with all possible despatch, proceed direct to Carr's or West Hartley spout, on the Tyne, and there receive on board, in the usual manner, from the agent of the charterers, a full and complete cargo of coals, which they bind themselves to ship, not exceeding what she can reasonably stow and carry over and above the tackle, provisions and furniture; and, being so loaded, shall therewith proceed to Malta or Algiers, at charterers' option, or so near thereto as she may safely get, and deliver the same (a) there, on being paid freight at and after the rate of 17*l.* sterling

(a) The charter-party was a printed form. It originally contained the words "at the *despôt*," but these words were objected to by the plaintiff, and were struck out.

per keel, in full; the coals to be taken alongside, free of expense to the ship; (the act of God, the Queen's enemies, fire, restraint of princes, and all and every dangers and accidents of the seas, rivers, and navigation, of what nature or kind soever during the said voyage, always excepted.) The freight to be paid by an approved bill on London, at three months from the delivery of a certificate to the charterers, signed by the consignees, of the right and true delivery of the whole cargo agreeably to bills of lading, less such cash as they may have advanced to the master, which he is at liberty to draw to the extent of 100*l.*, free of interest, and less the usual commission of 5 *per cent.* for procuring this charter. The charterers engage that the said vessel shall be loaded in regular turn as customary, also that she shall be unloaded, weather permitting, at the average rate of not less than twenty tons of coal *per diem*, Sundays excepted; and, if detained on their part, during a longer period, they engage to pay for such detention at the rate of 5*l.* *per diem*, to reckon from the time of the vessel *being ready to *unload, and in turn to deliver.* The [414 ship to be consigned to the charterers' agents at the port of delivery, on the usual terms. Penalty for non-performance of this agreement, 500*l.* It is further agreed, that, after the discharge of the coals, the ship shall proceed direct to Palermo for orders whether to load there, or at any other usual loading place in the two Sicilies, (Terra Nova excepted,) a full and complete cargo of wheat, or other lawful merchandise, for a safe port in the united kingdom, calling at Cork or Falmouth for orders, if required, for the freight of 6*s.* per quarter of wheat, or 28*s.* per ton of 20 cwt. of brimstone, net at the Queen's beam, and for all other goods in proportion to these rates, in full, an extra 6*d.* per quarter of wheat to be paid should the vessel load wheat at any other place than Palermo. Forty running days are allowed for loading and unloading the homeward cargo, from the vessel being in pratique, and ready to load and unload. The ship to be consigned to the charterers' agents, who are to have the option of cancelling the charter-party, should the vessel not reach Palermo on or before the 1st day of March next. Mats for the proper dunnage of the cargo, to be provided at the charterers' expense. It is agreed that no more than 5 *per cent.* commission is to be charged on the homeward cargo, which is to be sent alongside and taken from alongside free of expense to the ship. Cash to be advanced the master at his loading port abroad for ship's use, not exceeding 100*l.*, against his draft on his owner."

The following memorandum was endorsed on the charter-party:—

London, 16th December, 1841.

"It is now mutually agreed that so much of this charter-party as relates to the homeward voyage, shall be null and void in the event of the ship being unable *to sail from Algiers or Malta, after the discharge of the coals, on or before the 24th of February next, in which case [415

the charterers are to receive 18*l.* in lieu of commission on the homeward freight."

Under this charter-party, the *Cambria* proceeded to the river Tyne, and there took in a cargo of coals, consisting of 198 chaldrons, with which she sailed, and arrived at Algiers on the 15th of March, 1842. The captain, having cast anchor in the bay, went on shore, and reported his arrival to Lacrouitz, the consignee named in the bill of lading, stating that he was ready to discharge. He was then, for the first time, informed that the coals had been shipped by the defendants, under a contract with the French government, for the service of the marine department, under, amongst others, the following regulations as to unloading and delivery:—

"Vessels bound for Algiers, Bona, and Bougie, shall proceed to the roads of those three ports. The captains shall announce their arrival to the senior naval officer, and shall conform themselves to the instructions of this officer, with regard to placing the vessels to unload. The discharge shall commence, at the latest, the third day after the vessel shall have taken its assigned station. As in each of the ports of delivery it will not be possible to appoint more than one commission of receipt, the contractor should make his arrangements that two vessels should not arrive at the same port at the same time: but, if, notwithstanding this precaution, one vessel shall arrive at the same time with another, or before the discharge of the first shall be finished, it is then to be understood that the delay (a) of three days before stipulated shall not run, but shall date from the day when the discharge of the vessel or vessels arriving before it shall be completely finished."

*416] "The *Cambria* went into the harbour of Algiers, within the mole, the general place of discharge, on the 19th of March, and there took up a berth whence she might have been at once unloaded, but for the special regulation above referred to. There being, however, several other vessels at Algiers laden with coal consigned by the defendants to Lacrouitz for the use of the French government, that had arrived before the *Cambria*, her "turn to deliver," pursuant to the defendant's contract with the French government, did not arrive until the 27th of April, on which day Lacrouitz required the captain to proceed for that purpose to the government inlet, in another part of the harbour, which he did under protest. The unloading commenced on the 29th of April.

On the part of the plaintiff it was insisted, that, according to the true construction of the charter-party, the unloading at Algiers was to commence as soon as the *Cambria* took up such a position in the port as to entitle her to begin to discharge her cargo according to the general regulations of the port.

On the other hand, it was contended that the language of the charter-party was such as to challenge inquiry, and that the plaintiff was bound to take notice that there was some particular "turn" or rotation for the

(a) "*Délai*," "appointed term" or "fixed period."

discharge of the vessel, as to which he might have more specifically informed himself before he signed the charter-party.

In order to sustain their construction of the charter-party, the defendants attempted to show that there was a known, recognised course of trade in London with reference to the export of coals for the use of the French government on the coast of Africa—such a general and universal practice, well known amongst all persons conversant with the trade, that the plaintiff might fairly be presumed to have been aware of it, and to have entered into the charter-party with reference to it. Four witnesses, ship-brokers and merchants, were called to *speak to this custom. It was proposed, on the part of the defendants, to ask these witnesses whether [417 there was any general understood meaning of the words “in turn to deliver,” amongst ship-owners and merchants engaged in this particular trade. The question was objected to on the part of the plaintiff, but the objection was disallowed.

The witnesses stated, that, in the year 1836, the export of coals, under contracts, for the use of the British government, had much increased; and that, since the year 1841, a considerable trade had been carried on, principally confined to three mercantile houses in London, (of which the defendants’ firm was one,) in the export of coals to the coast of Africa for the use of the French government.

Upon its being objected, on the part of the plaintiff, that this practice was of too recent date, and too limited in its character, to establish a course of dealing that would bind the plaintiff, a ship-owner wholly unconnected with the particular trade, and that there was no evidence to show the particular form of charter under which the shipments referred to took place, the defendants put in four charter-parties applicable to this particular description of trade. The first of these was produced by one Arnold, a ship-broker, who stated that it was a form that he had adopted for about two years: the stipulation for delivery of the coals was as follows:—“To be delivered in her regular turn alongside craft, steamers, floating depôt, or pier, as the consignee may direct.” The second and third were produced by one Chapman: the one stipulated for a delivery “on the ship being in turn, ready to deliver into a steamer or a depôt at Constantinople:” the other stipulated that the vessel should “proceed to her majesty’s dock-yard, and deliver the cargo in her regular turn into store or the depôt ship there.” The fourth was produced by one Day, and [418 *stipulated that the ship should “proceed to a port indicated, and there deliver the cargo in her regular turn alongside craft, steamer, floating depôt, or pier.”

There were no general regulations of the port of Algiers as to the turn of unloading coals or any other merchandise.

With regard to what took place at Algiers in reference to the unloading of the Cambria, the case, as well on the part of the plaintiff as on that of the defendants, rested mainly upon the examination and cross-exami-

nation of the captain upon interrogatories before one of the masters, and upon the examination and cross-examination of Lacroutz and several other witnesses at Algiers under a commission. From these it appeared that the port of Algiers is governed by a director and officer of the royal navy, appointed by the French government; that no vessel laden with coals consigned for the use of the French marine department was permitted to unload except subject to the special regulation already mentioned; that several vessels laden with coals so consigned *by other parties*, which had arrived at Algiers since the *Cambria*, were unloaded at the government inlet before that vessel, but that none of those consigned by the defendants, that had arrived subsequently to the *Cambria*, had been permitted to take precedence of her in discharging at that place; and that there had been no unnecessary delay on the part of the defendants' agent at Algiers in despatching the vessel consistently with their contract with the French government. It also appeared that vessels destined for the general trade at Algiers were encumbered with no such special regulations, and consequently were able to discharge coals and other merchandise at the mole without any difficulty or delay.

For the plaintiff, it was submitted that the evidence failed to establish *419] the usage attempted to be set up; and *that the regulations of the marine department with reference to which the defendants' contract with the French government had been entered into, were not to be taken into consideration in construing the charter-party, as if they had been general regulations of the port.

For the defendants, it was insisted that the regulation in question in effect formed part of the general regulations of the port, and was binding upon all who entered it with coals for the use of the French marine department.

In presenting the case to the jury, the Lord Chief Justice told them, that, if they considered it proved to their satisfaction that there was a course of trade in London relative to the export of coals to Algiers for the use of the French government, so universally well known amongst all persons conversant with the trade that the plaintiff might fairly be presumed to have been cognisant of its particular regulations at the time he executed the charter-party, they must find for the defendants. But that, if, on the other hand, such course of trade was not made out to their satisfaction, the next question for their consideration was, what was the meaning of the expression "in turn to deliver" in the charter-party—whether the terms of the contract were such that they could only be satisfied by an unloading in turn at the government inlet, as suggested by the defendants; or whether they might not be satisfied by an unloading in any other part of the harbour, in the same manner as vessels with coals, or other merchandise, not destined for the service of the marine department, were usually unloaded, as contended for on the part of the plaintiff.

The jury returned a verdict for the defendants.

Sir *T. Wilde*, Serjt., (with whom was *J. P. Wilde*,) in Easter term last, obtained a rule nisi for a new trial, on "the ground that improper effect had been given to the evidence of usage, which, he submitted, was not admissible to control the charter-party, and that the verdict was against evidence. He cited *Randall v. Lynch*, 2 Campb. 352; *Hill v. Idle*, 4 Campb. 327; *Harman v. Clarke*, Ib. 159; *Barret v. Dutton*, Ib. 333; *Leer v. Yates*, 3 Taunt. 387; (a) *Brereton v. Chapman*, 7 Bingh. 559, 5 M. & P. 526; and *Bottomley v. Forbes*, 5 N. C. 121, 6 Scott, 816. [*420]

Channell and *Shee*, Serjts., (with whom was *Bovill*,) in Michaelmas term, showed cause. The expression in this charter-party, "in turn to deliver," being ambiguous, it clearly was competent to the defendants to show *aliunde* that these words had a known meaning amongst persons connected with the particular trade to which the contract in question related. In *Robertson v. French*, 4 East, 130, Lord ELLENBOROUGH, speaking of a mercantile contract, says, "it is to be construed according to its sense and meaning, as collected, in the first place, from the terms used in it; which terms are themselves to be understood in their plain, ordinary, and popular sense, unless they have generally, in respect of the subject-matter,—as by the known usage of trade, or the like,—acquired a peculiar sense distinct from the popular sense of the same words, or, unless the context evidently points out that they must, in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense." So, in *Hutton v. Warren*, 1 M. & W. 475, PARKE, B., in delivering the judgment of the court of Exchequer, says: "It has long been settled, that, in commercial transactions, extrinsic evidence of custom and usage is *admissible to annex incidents to written contracts, in matters [*421] with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life in which known usages have been established and prevailed; and this has been done upon the principle of presumption, that, in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to those known usages. Whether such a relaxation of the strictness of the common law was wisely applied where formal instruments have been entered into,—and particularly leases under seal,—may well be doubted; but the contrary has been established by such authority, and the relations between landlord and tenant have so long been regulated upon the supposition that all customary obligations not altered by the contract are to remain in force, that it is too late to pursue a contrary course; and it would be productive of much inconvenience if this practice were now to be disturbed." In *Cochran v. Retberg*, 3 Esp. N. P. C. 121, evidence of usage was

(a) And see post, p. 426 (a).

admitted to explain the meaning of "days" in a bill of lading—to show that it meant working days. In *Haynes v. Holliday*, 7 Bingh. 587, 5 M. & P. 572, the defendant, the master of a vessel, agreed in writing to take out to the Cape of Good Hope a boat belonging to the plaintiff, not exceeding thirty feet in length, and ten in width; the plaintiff tendered a boat within these dimensions, but it was a decked boat; the defendant refused to take it on board unless the deck were removed; evidence was given that it was the custom to remove the decks of such boats, as they tended to impede the navigation of the vessel; and it was held that such evidence was properly received. [MAULE, J. Suppose a party contracted to convey a lion, could there be any doubt that evidence *422] *would be admissible to show that it was customary to put animals of that description into cages?] In *Lewis v. Marshall*, 7 M. & G. 729, 8 Scott, N. R. 477, the defendants, ship-brokers, engaged for a certain commission, to procure for the plaintiff's ship a full cargo for Sydney, "the rates of freight for which would average 40s. per ton, and at least nine cabin passengers, passage-money average 75*l*." In an action for a breach of this agreement, the defendants offered parol evidence to prove that the terms "cargo" and "freight," when used in a contract of this description, and with reference to the voyage on which this vessel was engaged, by the general usage and course of the trade, not only comprised cargo and freight in the strict and proper sense of those words as applicable to goods, but comprised also steerage-passengers and the net profit arising from their passage-money. For the plaintiffs, this evidence, it was contended, was inadmissible, the terms of the contract being precise and free from ambiguity. The evidence was at first admitted, but was afterwards withdrawn from the jury; the Lord Chief Justice, who tried the cause, being of opinion that it ought not to have been received. And, in giving the judgment of the court upon a motion for a new trial, his lordship said: "The question was, whether there was a recognised practice and usage with reference to the voyage and business out, of which the written contract, the subject-matter of the action, arose, and to which it related, which gave a particular sense to the words employed in it, so that the parties might be supposed to have used those words in such sense. The character and description of evidence admissible for that purpose is *the fact* of a general usage and practice prevailing in the particular trade or business, not the judgment *423] and opinion of the witnesses; for, the contract may *be safely and correctly interpreted by reference to the fact of usage; as it may be presumed that such fact is known to the contracting parties, and that they contract in conformity thereto; but the judgment or opinion of the witnesses called affords no safe guide for interpretation, as such judgment or opinion is confined to their own knowledge. And, upon referring to the notes of the evidence on the trial, we incline to think the evidence offered fell under the latter character and description, and,

upon that ground, was properly withdrawn by the judge from the consideration of the jury." None of the cases cited on the motion does more than recognise the principle laid down in *Lewis v. Marshall*. The words "in turn to deliver" were inserted in this charter-party for an obvious purpose. And the trade in question being in few hands, and having grown up so recently, better evidence of usage could hardly be expected. The words "in turn to deliver" can have no sensible meaning, until explained by evidence as to the regulations and practice of the port of delivery: and the regulation under which the contractors here were bound to deliver in a particular order coals shipped for the use of the French marine department, was equally binding with the general regulations of the port of Algiers.

Sir *T. Wilde*, Serjt., (with whom was *J. P. Wilde*,) in support of the rule. There is nothing upon the face of this charter-party to show that the contract between the plaintiff and the defendants was entered into with reference to any engagement by the latter for the supply of coals to the French government. And it would be imposing a monstrous hardship upon a ship-owner who has let his ship under a general charter like this, to hold him bound by the terms of a contract entered into by the charterers with some third party, of which *he has no notice. The ship-owner [*424 would, of course, be bound by any general regulations of the port to which his vessel is addressed, but not by particular stipulations contained in a private contract entered into by the charterers with any one else. The evidence of usage was not admissible for the purpose for which it was offered; and even if admissible it was not cogent. It was much too limited in its character, and was too recent in point of date. Evidence of custom or usage to control written contracts, is at all times most unsatisfactory, and difficult of application, and has always been admitted with reluctance and regret. It is only upon the ground that it is so universal, and so well known that the parties must be supposed to have been dealing with reference to it, and to have intended to ingraft it upon their bargain. In *Bottomley v. Forbes*, the contract was not intelligible until explained by the evidence of usage. In *Gabay v. Lloyd*, 3 B. & C. 793, 5 D. & R. 641, in an action on a policy on horses "warranted free from mortality," it was found, by a special verdict, that, on the voyage, in consequence of a storm, the horses broke down the partitions between them, and, by kicking, so bruised each other that they died; and that a particular usage, with respect to policies on live-stock, prevailed at Lloyd's Coffee-house, in London, where the policy was effected, and was adopted both by the underwriters subscribing, and the merchants effecting policies there: and it was held, that this was a loss by perils of the sea, for which the plaintiff might recover, notwithstanding the warranty; and that, as it did not appear that the plaintiff knew of the usage prevailing at Lloyd's, or was in the habit of effecting policies there, such usage did not bind him. So, in *Bartlett v. Pentland*, 10 B. & C. 760, an

assured who resided at Plymouth, employed an insurance broker in London to *recover a loss from the underwriters; and the latter ad-
 *425] justed the loss by setting off in account against it a debt due to them from the broker for premiums, and the name of the underwriter was then struck off the policy. It was proved to be the custom at Lloyd's Coffee-house, in London, to consider such set-off as payment between the broker and the underwriters. The broker became bankrupt, and never paid the money to the assured: and it was held, that the set-off in account between the underwriter and the broker was not payment to the assured, inasmuch as the broker had only authority to receive payment for the assured, in money; that the custom which prevailed at Lloyd's Coffee-house was not binding on the assured, who were not shown to be cognisant of it, or to have assented to it; and that the erasure of the name of the underwriter from the policy,—that not having been done with the assent of the assured,—did not discharge the former. Lord TENTERDEN there said: "As to the supposed usage at Lloyd's; the usage in a particular place, or of a particular class of persons, cannot be binding on other persons, unless those other persons are acquainted with that usage, and adopt it. Merchants residing in London, and effecting insurances there, may reasonably be supposed to be acquainted with that usage, and to act upon it. But there is nothing in the case to raise such a presumption against the present plaintiffs; on the contrary, there is every thing to rebut such a presumption." Again, in *Scott v. Irving*, 1 B. & Ad. 605, Lord TENTERDEN, speaking of the same usage, says: "Such a usage can be binding only on those who are acquainted with it, and have consented to be bound by it." [ERLE, J. In those cases the evidence was offered for the purpose of modifying the contract; to control the plain meaning of the
 *426] words used.] *This is not like the case of *Smith v. Wilson*, 3 B. & Ad. 728, (a) where evidence was admitted to show, that, by the custom of the country, the word "thousand," as applied to rabbits, denoted "twelve hundred." The words "in turn to deliver" will be satisfied by a turn or rotation according to the general regulations of the port that bind all who enter it, without limiting their interpretation by the terms of some secret contract the charterers have entered into with strangers. The evidence of usage, therefore, was not receivable, and, supposing the evidence to have been receivable, it failed to establish such a known and universal usage as the contracting parties might be presumed to have had in their minds when the charter-party was made.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court.

This was an action brought by the owner of the ship *Cambria* against the charterers of that ship, to recover damages under the charter, for her detention at Algiers from the 19th of March, when she was ready to deli-

(a) And see *Struck v. Tenant*, Abbott on Shipping, 196, 6th edit.; *Donaldson v. Forster*, 1b. 222.

ver her cargo, until the 29th of April, when her discharge actually commenced. The jury found a verdict for the defendants; and the case comes before the court upon a motion to set aside that verdict, and for a new trial, first, upon the ground that evidence was improperly received; and, secondly, that the verdict itself was against the weight of the evidence.

The question upon the trial turned upon the clause in the charter-party which related to the delivery of the cargo, viz., that the vessel should be loaded in regular turn, as customary, and also that she should be [*427 *unloaded, weather permitting, at a certain average rate *per diem*, and, if detained longer, “the charterers engage to pay for such detention at the rate of 5*l.* *per diem*, to reckon from the time of the vessel being ready to unload, and *in turn to deliver*.” and the contest was, as to the meaning of the term “in turn to deliver.”

The particular question to which an objection was taken at the trial, was, whether there was any general understood meaning of those words amongst ship-owners and merchants entering into charter-parties with respect to the commerce or business then under investigation. And we think, so far as the question is concerned, there could be no possible objection to it. The plaintiff had a right to prove his case, and the defendants an equal right to prove theirs, if the facts would allow them respectively to do so, by proving that the contract was entered into with reference to a known recognised use of the particular terms employed in, or amongst those persons conversant with, the line of commerce or business to which it relates. And, although the answers given by the witnesses failed altogether in establishing such usage, the inquiry itself was unobjectionable.

The cause, therefore, proceeded upon the investigation, by evidence, into the meaning of those words, with reference to the subject-matter of the contract.

The words, in themselves, bear no precise meaning, until they obtain their application by the evidence. No judge or jury, looking only at the contract itself, can discover when it is that the ship *Cambria*'s turn to deliver will arrive, or, consequently, from what day the demurrage is to be calculated. Evidence, therefore, is necessary to explain how those words apply themselves to the regulations and practice of the port of Algiers, where the delivery of the cargo was to be made. And, accordingly, at the trial, evidence was given by both [*428 *parties on this point; and the contention now before us is, whether the weight of such evidence was in favour of the plaintiff or the defendants; the plaintiff insisting, that, upon the evidence, the turn for delivery by the *Cambria* had, by those regulations which can be considered as properly the regulations of the port of Algiers, come to her long before the 29th of April, and that the delay in her delivery was occasioned solely by

reason of some private regulations of the department of the French royal marine, for the use of which these coals had been consigned.

But, upon looking at the evidence, we think there is no room for this distinction ; but that the regulations of the French royal marine form part of those regulations of the port by which this question is to be decided. There seems no principle upon which the regulations of the port are to be held strictly confined to those which have been declared by the government itself ; but that they may well include all such regulations as are made, and are actually enforced, with the sanction and approbation of the government ; under which latter description the regulations made by the department of the French royal marine must be considered to fall.

Taking, therefore, the interpretation of the words to be, turn of delivery in conformity with the regulations of the port of Algiers, the question really becomes one of parcel or no parcel—was the regulation under which this delivery took place, a regulation of the port or not ? And we think, upon the evidence, it was.

It was strongly pressed upon us, that a great hardship would be imposed upon the ship-owner who lets his ship by a general charter, if he is to be affected by the consequences of a contract by the charterer to which he is altogether a stranger. But we think the answer is, that he knew, generally, the purpose for which the ship was taken, and her destination, *429] and might have *inquired as to the particular object of the charterers ; the more particularly as the uncertainty of the expression “ in turn to deliver ” might fairly provoke such inquiry.

We think, for these reasons, the rule nisi for a new trial should be discharged. Rule discharged.

PIM v. GRAZEBROOK and Another. Dec. 23.

In trespass for breaking and entering the plaintiff's mill, and taking his fixtures, &c., the defendants pleaded a title in A., as sub-lessee of the premises for a term of years, and that, A. becoming bankrupt before the lease expired, the defendants, as his assignees, elected to take to the lease, and entered and became possessed of the mill, &c.—giving to the plaintiff express colour.

The plaintiff replied, that A., before his bankruptcy, made a sub-lease to B., by way of mortgage, of the mill, &c., under which sub-lease B. entered and became possessed ; that, after A.'s bankruptcy, and whilst B. was so possessed, it was agreed between A., B., and the plaintiff, that B. and A. should grant an underlease of the mill to the plaintiff, and should sell him the fixtures, &c., at a certain price ; and that the plaintiff, with the consent of B. and A., before the bankruptcy of the latter, entered and became possessed of the mill, and of the fixtures, &c.

Held, that the replication was not objectionable on the score of ambiguity or of duplicity, the whole statement therein forming one complete title in the plaintiff to the possession of the *locus in quo* and of the fixtures, &c.

And, *per curiam*, a plaintiff is never entitled to judgment *non obstante veredicto* upon the ground of the insufficiency of the defendant's pleading, where the issue on the plea or rejoinder is found for the defendant, and against the plaintiff, unless such plea, or rejoinder, implies an admission of the plaintiff's title. (a)

(a) Vide post, 444, (b)

TRESPASS, for breaking and entering a certain mill, manufactory, yard, &c., of the plaintiff, making a noise, &c., disturbing the plaintiff, and seizing and converting divers fixtures, engines, machinery, and utensils of the plaintiff attached to the said mill, &c.; by means of which premises the plaintiff was not only greatly disturbed *and annoyed [*430 in the peaceable possession of the said mill, &c., and was, during all that time, hindered and prevented from carrying on and transacting therein his lawful and necessary trade and business, and thereby lost, and was deprived of, divers great gains and profits which he might, and otherwise would, have made from carrying on the said works and business, but was also greatly injured in his credit and circumstances, &c.

Third plea—that, on the 28th of September, 1804, one George Taylor was seised in his demesne as of fee of and in a certain close, to wit, the piece or parcel of ground upon which the mill, manufactory, yard, &c. in the declaration mentioned now are, and at the several times when, &c. were situate, &c., and, being so seised, he the said George Taylor afterwards, and before the said mill, manufactory, and yard had been or were erected, made, or built in and upon the said close, and long before any of the several times when, &c., to wit, on, &c., by a certain indenture then made between Taylor of the one part, and one Charles Berner of the other part, &c., did demise the said close to Berner, *habendum* to Berner, his executors, administrators, and assigns, for ninety-seven years from the 29th of September, 1804; that, by virtue of such demise, Berner entered, &c.: that Berner, being so possessed of the last-mentioned close for the term so to him therein granted, afterwards, and before the said mill, manufactory, and yard, had been and were erected, made, or built in or upon the said close, and before the first of the several times when, &c., to wit, on the 25th of December, 1806, by a certain indenture then made between Berner, of the first part, and one John Kerrison, of the other part, did demise the said close to Kerrison, *habendum* to Kerrison, his executors, administrators, and assigns, for sixty-one years from the 29th of September, 1806; that, by virtue of such demise, Kerrison *entered, &c.: that Kerrison, being so possessed thereof, after- [*431 wards, and before the said mill, manufactory, and yard, or any of them, or any part thereof, had been or were erected, made, or built in or upon the said close, and before any of the several times when, &c., to wit, on the 30th of December, 1835, by a certain indenture then made between Kerrison of the one part, and Joseph Hadley Reddell of the other part, &c., Kerrison did demise the said close to Reddell, *habendum* to Reddell, his executors, &c., for twenty-one years from the 25th of December, 1835; that, by virtue of such demise, Reddell entered, &c.: that, afterwards, and whilst Reddell was so possessed of the said close as aforesaid, he, Reddell, being a trader, became bankrupt, and a fiat in bankruptcy issued against him on the 28th of December, 1837, under which he was duly adjudged and declared a bankrupt, and certain persons, to wit, E.

Edwards, &c., were chosen and appointed assignees, and elected to accept and take, and did then accept and take, the lease so made and granted to Reddell, and to which he was at the time of the said bankruptcy so entitled as aforesaid; that by means and in consequence thereof the persons so appointed assignees of Reddell as aforesaid, then became and were possessed of the said close, for all the residue then to come and unexpired of the said term so to Reddell granted therein as aforesaid: that, being so possessed, the said assignees afterwards, and before any of the several times when, &c., to wit, on the 19th of February, 1838, by indenture assigned to one Joseph Freeman, his executors, administrators, and assigns, the said close, with the appurtenances, for and during all the residue and remainder then to come and unexpired of the term of twenty-one years so to Reddell granted as aforesaid; that, by virtue of such last-mentioned indenture, Freeman became possessed of the said close, &c.:

*432] that Freeman, being so *possessed, afterwards, and before the said mill, manufactory, and yard, or any of them, or any part thereof, had been or were erected, made, or built in or upon the said close, and before any of the several times when, &c., to wit, on the 17th of January, 1840, by a certain indenture then made between Freeman of the one part, and one Reuben Hunt of the other part, Freeman did demise the said close to Hunt, *habendum* to Hunt, his executors, administrators, and assigns, for the term of seventeen years, wanting fourteen days, from the 25th of December, 1839; and that, by virtue of such demise, Hunt entered and became possessed of the said close for the term so to him therein granted as aforesaid: that Hunt, being so possessed of the said close as aforesaid, afterwards, and before any of the several times when &c., to wit, on, &c., erected, made, and built in and upon the said close, the mill, manufactory, yard, &c. in the declaration mentioned, and attached and affixed thereto, and put and placed thereon, the fixtures, engines, machinery and utensils, goods and chattels, in the declaration mentioned, the said fixtures being trade fixtures, and severable and removable by the tenant of the said premises during the continuance of his tenancy: that Hunt, being so possessed of the said mill, machinery, yard, and premises, fixtures, engines, machinery, utensils, goods, and chattels in the declaration mentioned, as in the plea aforesaid, afterwards, and before any of the times when, &c., to wit, on the 26th of June, 1840, then being a trader, &c., became and was indebted to the defendant Grazebrook in 100*l.* and upwards, and, being such a trader and so indebted, on the 27th of June became a bankrupt, that a fiat issued against him on the 20th of August, under which he was duly adjudged and declared a bankrupt, and one Cannan appointed official assignee, and the defendants chosen assignees *433] by the creditors: that the defendants and Cannan, as assignees *of Hunt, afterwards, and after his bankruptcy, and before any of the several times when, &c., to wit, on, &c. last aforesaid, elected to accept, and did then accept, the said lease to which Hunt was entitled as

aforesaid at the time when he so became a bankrupt as aforesaid, and did then, to wit, on the day and the year last aforesaid, elect to become assignees of the said term of which Hunt was so possessed in the said close and premises in which, &c., at the time when he so became a bankrupt as aforesaid; and that by reason and means of the premises they, together with Cannan, became and were lawfully entitled to, and possessed of, the said mill, manufactory, yard, and premises, fixtures, engines, &c., in the declaration mentioned, as forming and being part of the estate and effects of Hunt at the time when he so became a bankrupt as aforesaid: that, whilst the defendants and Cannan were so lawfully entitled to, and possessed of, the said mill, manufactory, yard, and premises, fixtures, engines, &c., in the declaration mentioned, the plaintiff, claiming title to the possession of the said mill, manufactory, yard, and premises in the declaration mentioned, under colour of a certain fraudulent and void lease to him thereof made by Hunt, just before his bankruptcy, with intent to cheat and defraud the creditors of him, Hunt,—whereas nothing of or in the said mill, manufactory, yard, and premises in the declaration mentioned, or any part thereof, or any right to the possession thereof, or any part thereof, ever passed by the last-mentioned pretended lease,—and the plaintiff then, to wit, on, &c. last aforesaid, also claiming title to the said fixtures, engines, machinery, utensils, goods, and chattels in the declaration mentioned, under colour of a certain fraudulent and void deed of gift to him thereof made by Hunt, with the intent to cheat and defraud the creditors of him, Hunt, whereas nothing of or in the said* fix- [434
tures, engines, &c. in the declaration mentioned, or any of them, or any part thereof, ever passed to the plaintiff by virtue of the last-mentioned deed of gift,—afterwards, and before the first of the several times when, &c., and whilst the defendants and Cannan were entitled to the possession thereof as assignees as aforesaid, to wit, on, &c., entered into and upon the said mill, manufactory, yard, and premises in the declaration mentioned in which, &c., and the appurtenances, and was thereof possessed, and also then, to wit, on, &c. last aforesaid, claiming as aforesaid, took possession of the fixtures, engines, &c., in the declaration mentioned; and thereupon the defendants, as assignees of Hunt as aforesaid, and being so entitled to the possession of the said mill, manufactory, yard, and premises, fixtures, engines, machinery, utensils, goods, and chattels in the declaration mentioned as aforesaid, at the said several times when, &c., in their own right, and also as servants of Cannan, and by his command, entered into and upon the said mill, manufactory, yard, and premises in the declaration mentioned, and in which, &c., and in and upon the plaintiff's possession thereof, and committed the several alleged trespasses in the declaration mentioned, and whereof the plaintiff had above complained against the defendants, as they lawfully might for the cause aforesaid—verification.

Replication—that, after the time when Hunt became possessed of the
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mill, manufactory, yard, and premises, fixtures, engines, machinery, utensils, goods, and chattels in the declaration mentioned, as in the third plea alleged, and after the fixtures, engines, machinery and utensils, goods, and chattels in the declaration mentioned, had been attached to, and fixed and put and placed in and upon the mill, manufactory, yard, and premises in which, &c. in the declaration mentioned, and before Hunt became
 *435] and was a bankrupt as in that plea *aforesaid, to wit, on the 6th

of March, 1840, by a certain indenture then made between Hunt of the one part, and one Thomas Rogers of the other part, Hunt demised to Rogers the said close, to wit, the mill, manufactory, yard, and premises in which, &c. in the declaration mentioned, by way of mortgage, together with the said fixtures, engines, machinery and utensils, goods and chattels, to hold the same to him, Rogers, for all the residue then unexpired of the term therein so possessed by Hunt as aforesaid, except the last day of the said term; subject to a proviso for the redemption of the said term so thereby granted, in the last-mentioned indenture contained; that, after the making of the last-mentioned indenture, and after the erecting, placing, and fixing in and upon the said mill, manufactory, yard, and premises the said fixtures, engines, machinery and utensils, goods and chattels, by Hunt, as in the third plea was alleged, and before the bankruptcy of Hunt, to wit, on the said 6th of March, 1840, Rogers entered into and upon, and became and was possessed of, the said mill, manufactory, yard, and premises, and the said fixtures, engines, &c., for the term so to him thereof granted as aforesaid,* which was still unexpired and undetermined: that thereupon, afterwards, and before the bankruptcy of Hunt, and whilst Rogers was so possessed of the term so to him thereof granted as last aforesaid, and before any of the several times when, &c., to wit, on the 27th of June, 1840, by a certain memorandum of agreement in writing then made and signed by Hunt, Rogers, and the plaintiff, it was agreed that Rogers and Hunt should grant and execute to the plaintiff a lease of the mill, manufactory, yard, and premises in the declaration mentioned, for all the residue then to come and unexpired of the term of seventeen years wanting fourteen days, from the said 25th of December, 1839, granted by Freeman to Hunt as aforesaid, less three days of the said term,
 *436] at *the yearly rent of 400*l.*; that the plaintiff did thereby agree

to accept such lease and to execute a counterpart thereof; that it was thereby further agreed that Rogers and Hunt should bargain and sell to the plaintiff, and that the plaintiff should purchase and buy, and that he did thereby then buy, of them, and they did thereby then sell to him, the said fixtures, engines, &c., at and for the sum of 500*l.*, to be therefore paid by the plaintiff to Hunt and Rogers; as by the said memorandum, &c.: that, after the making of the last-mentioned agreement, and before the bankruptcy of Hunt, and before any of the times when, &c., to wit, on the said 27th of June, 1840, the plaintiff, in pursuance and under and by virtue of such agreement, and by and with the consent and

direction of Rogers and Hunt, entered into and upon, and then became and was possessed of, the mill, manufactory, yard, and premises in the declaration mentioned, and also then took possession, and became and was possessed, of the fixtures, engines, and machinery in the introductory part of the plea and in the declaration mentioned, and so remained and continued possessed of the same until and upon the several times when, &c.—verification.

Special demurrer, assigning for causes—that the replication neither properly traversed, nor confessed and avoided, any of the matters alleged in the plea—that, if it was intended as a traverse of any of those matters, it should have concluded to the country, instead of concluding with a verification; and, on the other hand, if it was intended to be in confession and avoidance of the plea, it did not sufficiently confess the same, or give any sufficient colour to the defendants—that the replication was an argumentative denial either of the possession of Hunt, at the time he became a bankrupt, of the said mill, &c., fixtures, engines, &c., or of the defendants' possession thereof, as his assignees, at the *several [437 times when, &c.—that the replication set up and showed a possession in the plaintiff of the said mill, &c., fixtures, engines, &c., commencing before the bankruptcy of Hunt, and continuing up to and until the said alleged times when, &c., which possession was repugnant to and inconsistent with the possession of Hunt at the time of his bankruptcy, and of the defendants as his assignees since the bankruptcy of Hunt; yet, nevertheless, the replication did not deny, otherwise than by argument or inference, the said possession of Hunt, or of the defendants as his assignees—that the replication did not tender any issue that could be safely accepted by the defendants—that the replication was ambiguous and uncertain, because it did not disclose whether the plaintiff claimed under, or founded his title upon, the possession of Hunt, or upon that of Rogers—that, if the mortgage to Rogers operated, as it would seem, and was alleged by the plaintiff, to have operated, to pass the legal estate and interest in the said mill, &c., fixtures, engines, &c., to Rogers, the alleged agreement between him, the plaintiff, and Hunt, was, in its legal operation and effect, an agreement between Rogers and the plaintiff, and should have been so pleaded; whereas, as it was pleaded, the defendants were unable to traverse safely the alleged mortgage to Rogers, lest it should be objected, that the agreement under which the plaintiff claimed, having been executed by Hunt, the alleged mortgage to Rogers was immaterial, and might be rejected as surplusage—and that, if the plaintiff was doubtful as to the legal effect of the agreement, he should have set it out in its very words.

Joinder in demurrer.

Manning, Serjt., in support of the demurrer. (a) The first objection to

(a) The argument took place in Easter term last, before Tindal, C. J., and Coltman, Cresswell, and Erle, Js. There had been a previous argument in Trinity term 1849, which resulted in an amendment of the replication. Vide post, p. 439, (a).

*438] the replication is, that it neither *confesses and avoids, nor traverses, the third plea. The plea alleges that Hunt becoming bankrupt, his interest in the premises, and in the fixtures, &c., vested in the defendants as his assignees. The allegation that Hunt continued in possession down to the time of his bankruptcy, is not denied. The replication is also bad for ambiguity and for duplicity. It states, that, after Hunt became possessed, and before his bankruptcy, he demised to Rogers by way of mortgage; and that, afterwards, and before Hunt's bankruptcy, and whilst Rogers was possessed, it was agreed between Rogers, Hunt, and the plaintiff, that Rogers and Hunt should grant an underlease to the plaintiff, and should sell the fixtures, &c., to the plaintiff; and that the plaintiff entered and became possessed of the mill, &c., and fixtures, engines, &c., under that agreement. It was not competent to the defendants to traverse both the demise by Hunt to Rogers by way of mortgage, and also the agreement under which the plaintiff is alleged to have entered, whereby he would become tenant at will to Hunt or Rogers: and, though the plaintiff has avoided saying *to which*, that omission cannot make the replication good. If the defendants had traversed the mortgage by Hunt to Rogers, and had succeeded upon that traverse, the plaintiff might have moved for judgment *non obstante veredicto*; because, although the agreement would appear to be a mere nullity as to creating any demise from Rogers, yet, as Hunt was a party to it, the interest that remained in him—the demise by him to Rogers being removed out of the way,—would be sufficient to vest the premises in the plaintiff by the agreement and the entry under it: and, if they had traversed the agreement between Rogers and Hunt and the plaintiff, that would have left unanswered the right of

*439] Rogers to the *possession of the mill, &c., and of the goods, by virtue of the mortgage, and his entry and possession under the same. [COLTMAN, J. Would not the replication have been sufficient if it had concluded with a traverse of Hunt's possession? TINDAL, C. J. That would get rid of the difficulty suggested as to the motion for judgment *non obstante veredicto*. (a)] There is no positive allegation that Hunt was possessed. The title under the agreement is also defective. It is a general rule of pleading, that an instrument must either be stated according to its legal effect, or be set out *in hæc verba*. In Com. Dig. *Pleader*, (C. 37,) it is said: "If the plaintiff conveys to himself an estate by deed, he ought to plead the conveyance as it operates in law, and not according to the words of the deed." (b) And it is only necessary to state enough of the deed to show a title to the action. (c) "And therefore, if, by the deed, the words are, *I give, grant, release, and confirm*, he must not say

(a) The amendment suggested would have restored the replication to its original state. When before the court upon the former occasion, it was as it now stands as far as the asterisk, p. 435, and then it concluded as follows:—"Without this, that the said Reuben Hunt was possessed of the same, or any or either of them, or any part thereof, at the time when he became bankrupt, in manner and form as in the said third plea is alleged," concluding to the country.

(b) 1 Vent. 109, 110.

(c) And see *Bristow v. Wright*, 2 Dougl. 667.

that such a one *dedit, concessit, relaxavit, et confirmavit*, but he ought to say *quod concessit*, or *quod relaxavit, &c.*, as the deed operates.” (a) “So, if a deed operates as a covenant to stand seised, he cannot say, that, for affection *concessit*,” &c. (b) “And, though he adds, *quæ quidem concessio operavit per viam conventionis stare seisit, &c.*, it is not good, for this is impertinent.” (c) Here, if the mortgage to Rogers was a *bonâ fide* transaction, and not, as the assignees *contend, merely colourable, the plaintiff might, with respect to the possession of the mill, &c., [*440 have relied upon that mortgage, with the tenancy at will in himself under Rogers, or, if he did not think that course safe, he might have abandoned the mortgage, and taken his stand as tenant at will to Hunt, under a demise from him as continuing termor. (d) It is true, that if the plaintiff had taken the former course, he must have set up a separate title under Hunt to the fixtures; but this would have been attended with no practical inconvenience. The effect of the replication, with respect to the course open to the defendants in rejoining, is precisely the same as if the plaintiff had said, “that the term being either in Hunt or in Rogers, both demised to the plaintiff, to hold as tenant at will to the one or to the other.”

Channell, Serjt., contrâ. The replication to the third plea sets up but one entire answer, which answer is necessarily composed of two links, viz., the demise by way of mortgage from Hunt to Rogers, and the agreement by Hunt and Rogers, with the plaintiff, to demise to him the mill, &c., and absolutely to sell to him the fixtures, &c. The introduction of both was essential to the plaintiff’s case, and the defendants might have traversed both. The difficulty suggested might have arisen, if the conveyance to the plaintiff had been *by deed under seal*, and purporting to be a direct conveyance by Hunt.

Manning, Serjt., in reply. The defendants could not have traversed both the titles set up in the replication. But, supposing a cumulative traverse or a rejoinder *de injuriâ* could have been supported, the defendants *were not bound to acquiesce in the course taken by the plaintiff in setting up a double title. If the plaintiff had replied [*441 that *either* Hunt or Rogers was seised in fee, a rejoinder that *neither* was seised might have been good; but the defendants would not be bound to give the plaintiff the benefit of an alternative answer to their plea, whatever difficulty there might be, upon the state of the title, in saying whether the legal seisin was in the one or in the other.

All acts done as well as instruments executed, are to be pleaded according to their legal effect. In debt on a bail-bond, the plea is, not that the party has put in common bail, but *quod comperuit ad diem*; “for

(a) *Baker v. Lade*, 3 Lev. 292; *Wilson v. Armorer*, 1 Vent. 78; *Chester v. Willan*, T. Raym. 187, 1 Sid. 452, 2 Saund. 96.

(b) 3 Lev. 292, 4 Mod. 150, Skinn. 315.

(c) 3 Lev. 292; post, 441.

(d) *Seem* that the bankruptcy of Hunt would not have determined his will as lessor. Vide *Hemsworth v. Brian*, antè, Vol. i. p. 231, as to submission to arbitration.

he must plead according to the operation things have in law." *Stroud v. Lady Gerrard*, 1 Salk. 8.(a) *Cur. adv. vult.*

TINDAL, C. J., now delivered the judgment of the court.

The plaintiff declared in trespass, for breaking and entering his mill, manufactory, &c., and taking his fixtures and other goods and chattels.

The third plea stated a title in one Reuben Hunt, as sub-lessee for a term of years, and that, Hunt becoming bankrupt, the defendants, as his assignees, before the time when, &c., accepted the sub-lease, and entered upon the mill, goods, and chattels, &c., and thereby became possessed of the same; the plea giving colour to the plaintiff, in order to avoid a formal objection.

The replication to this third plea (upon which the question before us arises) was, in substance, that Hunt, before his bankruptcy, made a sub-lease to one Rogers, by way of mortgage, of the said mill, manufactory, &c., together with the fixtures, machinery, goods, and *chattels, *442] under which sub-lease Rogers entered and became possessed of the mill, manufactory, fixtures, &c., for the term so to him granted, and that afterwards, and before the bankruptcy of Hunt, and whilst Rogers was so possessed for the term, which is still undetermined, by an agreement in writing between Hunt, Rogers, and the plaintiff, it was agreed that Rogers and Hunt should grant an under-lease of the mill, &c., to the plaintiff, and that they, Rogers and Hunt, should sell, and the plaintiff should buy, the fixtures, machinery, goods, and chattels, at a certain price; under which agreement the plaintiff, with the consent of Rogers and Hunt, before Hunt's bankruptcy, entered and became possessed of the said mill, &c., and took possession and became possessed of the fixtures, engines, and machinery in the introductory part of the third plea mentioned.

To this replication the defendants demurred specially for the causes by them assigned; and, upon the argument before us, the principal objection insisted upon was, that the replication was ambiguous and double: ambiguous, because it left the defendants in doubt whether the plaintiff meant to rely on an agreement by Hunt, or an agreement by Rogers, with the plaintiff; and that the replication was double, because (as it was contended) the defendants could not traverse at the same time both the mortgage to Rogers and also the subsequent agreement between Rogers and Hunt with the plaintiff; and, further, that, if the defendants traversed the mortgage to Rogers alone, and such traverse was found for the defendants, the plaintiff might still move for judgment *non obstante veredicto*, inasmuch as, the mortgage to Rogers being out of the way, there would be nothing to prevent the subsequent agreement to demise the premises and to sell the goods to the plaintiff, from having its full operation as an agreement by Hunt alone: and, if, on the other hand, the defendants

(a) And see H. 18 E. 2, fo. 595, 596; T. *eodem anno*, fo. 614; *Lord Dudley v. Lord Powles*, M. 5 H. 7, fo. 1, pl. 1; 1 M. & G. 281, 3 M. & G. 780, 7 M. & G. 318.

should traverse the agreement between Rogers and Hunt and *the plaintiff, and succeed upon such traverse, still it would appear [*443 that they, the defendants, had no right either to the possession of the mill and other premises, or of the goods, which was in Rogers, by virtue of the mortgage to him, and his entry and possession under the same.

But we think the defendants' objection ought not to prevail. This is an action, not only for the breaking and entering, but also for the taking of the goods and chattels of the plaintiff. The defendants have justified the whole trespass, both the breaking and entering and the taking of the goods, under their right to the possession as assignees of Hunt, a bankrupt. The plaintiff, again, in his replication, sets up a prior right to the whole, that is, both to the possession of the premises and of the goods and chattels, under a mortgage of the premises and of the goods and chattels to Rogers, and an agreement between Rogers, the mortgagee, and Hunt, the mortgagor, for a sub-lease to the plaintiff of the premises and fixtures, and for an absolute sale to him of the goods and chattels. This forms one complete title in the plaintiff to the possession of the whole, *i. e.* both of the place in which, &c., and of the goods and chattels: and there can be no reason, as it seems to us, why he should not be at liberty to plead his title to the whole as it really exists. It may be true, that, in consequence of the title being pleaded as it is, the defendants cannot take issue on the demise to Rogers: but the reason why they cannot do so is, that, even though nothing passed by that demise, the plaintiff would still have a sufficient title under the agreement between him and Hunt and Rogers, and the issue taken on the mortgage would be immaterial, inasmuch as it would leave the plaintiff's title unanswered. It may also be true that the defendants could not rely simply on a denial of the plaintiff's title under the agreement between Rogers, Hunt, and Pim, inasmuch as, the demise to Rogers *being unanswered, the defendants would still appear, on the whole record, to be tres- [*444 passers. But we see no reason why the defendants should not be at liberty to include in one traverse the whole title as it is pleaded, that is, the mortgage to Rogers, and the subsequent agreement made with the plaintiff, as both together constitute but one title,^(a) and, unless both are denied, no answer is given to the plaintiff's replication. Such a traverse cannot, we think, be open to objection on the score of duplicity; for, duplicity implies the setting up of two answers to the same subject matter of allegation, whereas the traverse in this case would only set up one entire answer to the replication. And, that it is one entire answer only, appears clearly from this consideration, that, if either branch of it were omitted, the remainder alone would furnish no answer to the replication. Such a traverse falls within the principle on which the case of *Bell v. Tuckett*, 3 M. & G. 785, 4 Scott, N. R. 403, 1 Dowl. N. S. 458, rests;

(a) In objecting to the replication, the defendants contended that it set up two titles.

and this consideration appears to us to obviate the whole of the difficulty set up on the part of the defendants.

And, as to the objection, that, if the defendants took issue on the mortgage only, and succeeded upon it, the plaintiff would be entitled to the judgment of the court *non obstante veredicto*, it appears a sufficient answer, that the plaintiff is never entitled to such judgment upon the ground of the insufficiency of the defendant's pleading, (where such plea or rejoinder is found for the defendant, and against the plaintiff,) unless the plea, or rejoinder, implies an admission of the plaintiff's title, which a traverse by the defendant never does : *Gwynne v. Burnell*, 6 N. C. 453, 1 Scott, N. R. 711.(a) And the decision of this court in the *445] *case of *Hitchcock v. Humfrey*, 6 Scott, N. R. 540, does not appear in any way inconsistent with the doctrine above laid down ; for, in the latter case, the traverses by the defendant were altogether immaterial traverses ; being traverses of allegations in the declaration which were unnecessary. The allegations themselves, therefore, might be considered as struck out of the declaration ; and with them the traverses, and the finding thereon, must fall to the ground. In fact, the judgment *non obstante veredicto* appears to be only one species of judgment by confession, where the plea confesses a right of action, but sets up an avoidance bad in substance ; which cannot hold good as to a material traverse, whether of the whole, or a part only, of the plea.

Judgment for the plaintiff.

(a) In *Hudson v. Jones* it is said, that " whatever is traversable and not traversed, is admitted." In *Cowlshaw v. Cheslyn*, 1 Cr. & J. 48, the defendant, in trespass *quare clausum fregit*, pleaded that A. was seised in fee, and that A. being so seised, granted a right of way by a lost deed. The replication traversed the grant ; and it was held that the plaintiff could not give evidence that A. was not seised. In *Dimes v. Morris*, 3 N. & M. 671, it is supposed (p. 681) that *Cowlshaw v. Cheslyn* is at variance with *Eden's case*, 6 Co. Rep. 15 b, where it was held that the effect of *non concessit* replied to a plea alleging that the Queen was seised *jure coronæ*, and, being so seised, by letters-patent *concessit*,—was to put in issue that the Queen had any thing in the land. But *Eden's case* stands upon this special ground—that, as the letters-patent (of the incontrovertible verity of which the courts take judicial notice) cannot be traversed, the only meaning assignable to the words *non concessit*, is, that the Queen was not seised. In *Taylor v. Needham*, 2 Taunt. 278, the plea of *non dimisit* was held to put the title of the demising plaintiff in issue. But in *Taylor v. Needham*, the declaration contained no allegation of title in the plaintiff, the declaration commencing with a *quod cum dimisisset*, and the question of title was (as in the case of a plea of *non concessit* to letters-patent) involved in the assumption and exercise of the power of demising. And see P. 12 E. 4, fo. 4, pl. 9 ; T. 13 H. 7, fo. 24, pl. 1 ; *Martine v. Hardy*, Dyer, 122 b, pl. 23 ; Co. Litt. 47 b ; *Broadbent v. Wilks*, Willes, 366.

In the principal case, the trespasses were confessed by the plea ; upon that confession the plaintiff would be entitled to judgment for his damages, unless the plea contained an answer, sufficient in point of law, and not effectually traversed or avoided by the replication. The matter of justification set up by the plea is confessed and avoided by the replication ; and upon any issue, on which the defendants could expect to succeed, the matter replied in avoidance would remain unanswered.

*IN THE EXCHEQUER CHAMBER.

[*446]

ELLIOTT v. TURNER and Others. Nov. 29.

The words of a specification are to be construed according to their ordinary and proper meaning, unless it be shown by something in the context, (which may be explained by evidence,) that a different construction ought to be adopted.

In covenant on an indenture by which B. was licensed to make and sell buttons according to A.'s patent, the issue was whether certain buttons made by B. were made under the license. The specification described the invention to consist in the application to the covering of buttons, of such figured woven fabrics "wherein the ground, or the face of the ground thereof, is produced by a warp of *soft or organzine silk*, such as is used in weaving satin and the classes of fabrics produced therefrom." The jury asked how they were to understand the word "or" in the specification; whether it was used disjunctively, or, whether "*organzine*" was the construction of the word "*soft*." The judge told them, that, in his opinion, unless the silk were *organzine*, it was not within the patent:—

Held, upon a bill of exceptions, that this direction was erroneous; for, that the judge should not have told the jury that, in his opinion, *soft and organzine silk* were absolutely the same, but that the words were *capable* of being so construed, if the jury were satisfied that, at the date of the patent, there was only one description of *soft silk*,—and that, *organzine*,—used in satin weaving; but, otherwise, that the proper and ordinary sense of the word "*or*" was to be adopted, and the patent held to apply to every species of *soft silk*, as well as to *organzine silk*.

COVENANT. The declaration stated, that, on the 22d of May, 1841, by a certain indenture then made between the plaintiff of the one part, and the defendants of the other part—after reciting that the plaintiff was the true and first inventor of certain improvements in the manufacture of covered buttons, and further reciting that the said invention was new as to the public use and exercise thereof within England, &c., and that her majesty Queen Victoria, by her letters-patent under the great seal of Great Britain, bearing date the 14th of December, 1837, had, for herself, her heirs and successors, given and granted unto the plaintiff, his heirs, executors, administrators, and assigns, especial license, full power, sole privilege, and authority, that he the plaintiff, his executors, &c., and every of them, by himself and themselves, or by his or their deputy or deputies, servants or agents, or such others as he, the plaintiff, his [*447] executors, &c., should at any time agree with, and no others, from time to time, and at all times thereafter during the term of years therein mentioned, should, and lawfully might, make, use, exercise, and vend the said invention within England, &c., for fourteen years from the date of the said letters-patent; and further reciting that a specification of the said invention, under the hand and seal of the defendant, had been duly enrolled in Chancery on the 14th of June, 1838; and further reciting, that one John Holmes, thereinafter mentioned, was the true and first inventor of an improvement in metallic shanks for buttons, and that the last-mentioned invention was new, as to the public use and exercise thereof within England, &c., and that King William the Fourth, by his letters-patent

under the great seal of Great Britain, bearing date the 4th of May, 1833, had for himself, his heirs and successors, given and granted unto Holmes, his executors, &c., especial license, full power, sole privilege, and authority that he, Holmes, his executors, &c., by himself or themselves, or by his and their deputy and deputies, servants, or agents, or such others as he, Holmes, his executors, &c., should agree with, and no others, from time to time, and at all times thereafter during the term of years therein expressed, should and lawfully might make, use, exercise, and vend the last-mentioned invention within England, &c., for fourteen years from the date of the last-mentioned letters-patent; and further reciting, that a specification of the last-mentioned invention, under the hand and seal of Holmes, had been duly enrolled; and further reciting, that, by divers mesne assignments and other acts in the law, and ultimately by a certain indenture therein more particularly described, the last-mentioned letters-patent had been well and effectually vested in the plaintiff for all the residue of the term by the last-mentioned letters-patent granted—the

*448] plaintiff, for certain considerations *in the said indenture mentioned, did give and grant unto the defendants, their executors and administrators, full and free license, power, privilege, and authority to use, exercise, and put in practice, at, &c., or at such other place or places as the defendants, their executors or administrators, should, at any time, and from time to time, thereafter, upon such notice to the plaintiff, his executors, &c., as in the said indenture thereafter mentioned, think proper, the said invention for which the letters-patent of the 14th of December, 1837, and of the 4th of May, 1833, had been so respectively granted as aforesaid, so far as the said inventions are applicable to covered buttons; and to vend, sell, and dispose of the buttons manufactured according to the said several inventions and the said specifications thereof respectively, when, where, and as the defendants should think fit; to have and to hold the said license, power, privilege, and authority thereby given and granted, thenceforth for and during all the residues of the respective terms granted by the said several letters-patent; yielding and paying to the plaintiff, his executors, administrators, and assigns, as and for rent or patent dues, for the said license under the letters-patent of the 14th of December, 1837, during the term thereof, such sum and sums of money as should be at the rate of 15*l.* for every 100*l.* on the net selling price of all buttons with central patterns made in pursuance of, and according to, the said letters-patent of the 14th of December, 1837, and the aforesaid specification thereof; and as and for rent or patent dues for the said license under the letters-patent of the 4th of May, 1833, during the term by those letters-patent granted, such sum and sums of money as should be at the rate of 10*l.* for every 100*l.* on the net selling price of all buttons with metallic shanks, and made in pursuance of, and according to, the said letters-patent

*449] *of the 4th of May, 1833, and the said specifications thereof—such several payments to be made

half-yearly, on the 24th of June and the 25th of December in every year, the first payment to be made on the 25th of December then next ensuing, and the last payment to be made within three calendar months after the expiration of the term of fourteen years granted by each of the said letters-patent respectively; subject, among other things, to a certain proviso or condition that the net selling prices of all buttons to be made under and by virtue of either or both the said patents, should be the same as are mentioned and specified in the first schedule to the said indenture annexed, at such credit as thereafter in the said indenture mentioned, or such other prices or such other credit as should from time to time be fixed and agreed upon by some note or memorandum in writing, to be signed by the plaintiff, his executors, &c., and the defendants, their executors and administrators, and such other person or persons as should, from time to time, have license, power, privilege, and authority from the plaintiff, his executors, &c., to use, exercise, and put in practice the said inventions, or either of them. [The schedule of prices was here set out.] And the defendants, in and by the said indenture, for themselves, their executors and administrators, did covenant with the plaintiff, his executors, &c., (amongst other things,) in manner following, that is to say, that they, the defendants, should and would, during the continuance of the licenses thereby granted, or either of them, render unto the plaintiff, his executors, &c., within one calendar month next after the 25th of March and the 29th of September in each year, a just and true account or particular in writing of the quantities, numbers, and value of the buttons made by them in the preceding half-year, or *other portion of a year, as [450 the case might be, up to the last-mentioned half-yearly days respectively, under and by virtue of the license thereby granted, specifying what portions of the buttons so made and sold had the central pattern, and what portion had the said metallic shank, and what portion had the said central pattern and the said metallic shank combined, and also specifying the prices for which the same respectively were sold, and the dates and amounts of sales, and the amount of rent and patent dues payable in respect of the same; such accounts to be rendered according to the form of a certain other schedule thereunto annexed—the first of such accounts to be rendered as aforesaid within one calendar month after the 25th of March then next ensuing, and the last account within one calendar month next after the expiration or other earlier determination of the license by the said indenture granted for the said respective inventions, *prout patet*, &c. That by virtue of such license, the defendants afterwards, to wit, from the 22d of May, 1841, unto the commencement of the suit, had used, exercised, and put in practice the said inventions so far as the same are applicable to covered buttons, and had vended, sold, and disposed of the buttons manufactured according to the said several inventions respectively, and the said specifications thereof, when, where, and as the defendants had thought fit: Averment of performance by the plaintiff: Breach,

that the defendants did not nor would, during the continuance of the said licenses, render to the plaintiff, within one calendar month next after the 25th of March last past, a just and true account or particular in writing of the quantities, numbers, and value of the buttons made by them, the defendants, in the portion of a year between the day of the date of the *451] said license and the 25th of *March last past,(a) under and by virtue of the said license, and of the prices for which the same were sold, and of the dates and amounts of sales, and the amount of rent and patent dues payable in respect of the same, according to the form and effect of the said indenture in that behalf; but, on the contrary thereof, the defendants, after the making of the said indenture, and whilst the licenses thereby granted were in full force, and valid, and whilst the defendants were using, exercising, and putting in practice the said inventions as aforesaid, to wit, on the 22d of May, 1841, and on divers other days between that day and the said 25th of March, made divers, to wit, 500, gross of buttons with central patterns, under the name and description of "Italian Twist Dress Buttons," under and by virtue of the said license, and sold the same, and did not render any account or particular in writing of the quantities, numbers, and value so made, contrary to the form and effect of the said indenture, and of the covenant so made by the defendants as aforesaid: And so, &c.

Plea—that the said buttons with central patterns, under the name and description of "Italian Twist Dress Buttons," in the said breach mentioned, were not, nor were any of them, buttons made under and by virtue of the said license, nor under or by virtue of either of the said letters-patent or specifications in the declaration mentioned, *modo et formá*. Issue thereon.

The cause was tried before COLTMAN, J., at the sittings at Westminster, after Hilary term, 1843. The plaintiff put in the letters-patent of the 14th of December, 1837, for "improvements in the manufacture of covered buttons," and the specification, the material parts of which were as follow:—

*452] *"My invention relates to that description of covered buttons, with flexible shanks, which are made by the aid of dies and pressure, in contradistinction to the covered buttons made by sewing the external woven fabric on to shapes by the needle; my invention having for its object to produce buttons of a more elegant description, and of a more finished character than have heretofore been manufactured, by the application of certain elegant fabrics not hitherto employed in the making of such buttons. It may here be stated that there are several modes of making such description of buttons, differing in some degree from each other. The first is the plan known as Saunders's method, for which he obtained letters-patent, bearing date the 13th of October, 1825, but

(a) The action was commenced on the 12th of May, 1842. The license was dated the 22d of May, 1841.

which letters-patent were not sustained.(a) Secondly, there is a plan which has been much pursued, and is well known as Mr. Aston's mode.(b) And, thirdly, a plan was invented by Benjamin Aingworth, for which he obtained letters-patent, bearing date the 30th of August, 1832. I have mentioned these inventions in order to state that I do not claim the *making* of covered buttons, with flexible shanks, by the aid of dies and pressure, but only *improvements* in their manufacture; and further to state, that my invention is more or less applicable to all such modes and variations of such modes of making covered buttons with flexible shanks; my invention more particularly relating to the covering of the face or front surface of the button, without reference to the modes of making flexible shanks, and without reference to the interior construction of the button, so long as the buttons are made by the aid of dies, or such like dies, and pressure, and not covered by hand with the needle.

*“ Till my invention, such covered buttons with flexible shanks, made by pressure, had not been manufactured or made with covers [453 of the description of fabrics hereafter stated, having marked and definite designs produced in the weaving of the fabric in the centre of each button; such invention requiring that the woven figured fabric should be so cut into discs or circular portions, and the same so worked in dies or tools as to bring the figure or design in a central position in respect to the face or front of the button; and, further, in the act of making the buttons, not injuriously to press on the surface where the pattern is, particularly in such cases where the pattern or design stands much above the ground of the woven fabric, as in the case where the design or pattern is of weavings known as terry velvet.

“ I lay no claim to the weaving of figured fabrics suitable for carrying out my invention; nor do I confine myself to the use of any particular mode or modes of weaving, nor to the nature of the woven figure or design, nor to the ground or fabrics in or on which the figures or designs are woven: my invention, in the first place, only relating to the application of certain fabrics having a set figure or design for the centre of each button, made by the process in weaving called terry weaving, or of laying in threads, or any description of ground, by the process called brocade weaving. But, although I do not claim the same, I shall hereafter give such directions and advice to the button-maker as will enable him to give instructions to the weaver for such fabrics with ornamental figures or devices produced therein or thereon, as will facilitate the work-people in cutting out such fabrics into coverings for buttons, and readily enable them so to cut the same as to insure the pattern or design coming centrally on the face of a button.

“ I do not claim any mode of weaving; and have *only called [454 the attention of the button-maker to these matters, in order to his

(a) Vide *Saunders v. Aston*, 3 B. & Ad. 681, 1 Webster's P. C. 75.

(b) Vide *Elliott v. Aston*, 1 Webster's P. C. 222.

fully understanding the nature of my invention ; and to state that my invention is not confined to the nature of the fabric, other than is hereafter and hereinbefore explained, or the peculiar movements of the loom to obtain a fabric having ornamental figures or devices suitable for being placed centrically on the face or front surfaces of all covered buttons aforesaid. But, whatever be the nature of the fabric employed in carrying out the invention, the main object to be considered is, that there shall be patterns consisting of ornamental designs or figures at such distances apart as to be suitable for being cut out into circular portions, each for the covering of a button, and each having an ornamental design or figure, and the whole so woven as to allow of the fabric being cut into such portions or parts ; and, further, to work up such portions or parts that the ornamental figure or design may come truly in the centres, or so nearly the centres, of the buttons, that the face or front surface of the buttons will not have a distorted appearance in respect of the ornamental figures or designs being materially out of the correct central positions. This, the third part of my invention, being the application of such fabrics only wherein the ground or face of the ground thereof is produced by a warp of *soft or organzine silk*, such as is used in weaving satin, and the classes of fabrics produced therefrom, which are well known, viz., satin ground, with ornamental central figure, produced of any fibre, satinet, &c. &c.”

After describing the mode of weaving, and the tools to be used for cutting, &c., the specification proceeded as follows :—

“ Having thus described the nature of my invention, and the best manner I am acquainted with for performing the same, I would remark that I
 *455] do not confine myself to the mode described for making the internal parts and back of buttons, though I believe the mode described is the best adapted for the purpose of my invention. Nor do I claim the mode described, when uncombined with a covering according to my invention. But what I claim as my invention is,—first, the making of covered buttons, with flexible shanks, by the aid of dies and pressure, when the face or front of the button is made of any description of fabric with raised surfaces, producing a set pattern, or ornamental figure, by terry weaving, for the centre of the button. Secondly, I claim the making of such covered buttons with flexible shanks, when covered with any fabric with ornamental, set, or central figures or patterns produced thereon, by a process called brocading or brocade weaving. Thirdly, I claim the application of such figured woven fabrics to the covering buttons with flexible shanks, made by pressure in dies, as have the ground, or the face of the ground, woven with *soft or organzine silk* for the warp, when such fabrics have ornamental designs or figures for the centres of buttons, as herein described. But I do not claim the application of any figured patterns of woven fabrics, where the portions constituting the covers of buttons may be cut indiscriminately. This part of my inven-

tion relating only to such patterns as require centring in order to bring the pattern or ornamental figure or design in the centre on the face of the button," &c. &c.

Several witnesses, manufacturers and persons otherwise skilled in the manufacture of silk fabrics, were called on the part of the plaintiff. They stated that the warp of the covering of certain buttons produced, (and which were made by the defendants, as was alleged, under the license granted to them by the plaintiff,) was composed of what they call three-thread organzine or soft silk; and they described organzine to be [*456
*made by twisting a *single thread* of raw silk, (which consists of a combination of any given number of the filaments as wound from the cocoon,) and then again slightly throwing or twisting *the reverse way* two or more of the threads so twisted. They also described tram-silk, which consists of *two threads* of raw silk twisted together without having been previously twisted singly, as being a *soft* kind of silk, if slightly twisted or thrown.

On the other hand, several witnesses called on the part of the defendants, and amongst them the very individuals who manufactured the cloth in question for the defendants, swore that the warp was not organzine, but twist, formed of two threads or filaments of raw silk twisted together, and two of these put together and thrown or twisted in *the same direction*.

It was contended for the plaintiff, that, even supposing the article in question was not composed of a warp of three-thread organzine, but of the twist described by the defendants' witnesses, still it would be virtually and substantially an evasion of the plaintiff's patent. For the defendants it was insisted that there had been no infringement or evasion of the patent, and that the buttons in question were not made under the license granted to them by the plaintiff, inasmuch as the warp of the covering was not of organzine or soft silk, but of twist, a material which was shown by the evidence to be totally inapplicable to the weaving of satin.

The learned judge, in summing up the case to the jury, told them that the question for their consideration was, whether the article complained of as being an infringement of the plaintiff's patent, was produced with a warp which was substantially of that description of silk known by the name of "organzine or soft silk," such as is used in weaving satin. And, after going through, and commenting upon, the evidence on both sides, he told them, that, if they thought that the material *used by the defendants, though called *twist*, was substantially to be looked [*457
upon as *organzine*, such as is used in weaving satin, it was an infringement of the patent, and the defendants had been guilty of a breach of their covenant, whatever the number of threads of which the article was composed.

The foreman of the jury thereupon observed that it would much assist them, the jury, if the learned judge would tell them how they were to interpret the word "or" in the specification—whether it was disjunctive, or whether "organzine" was the construction of the word "soft."

The learned judge said: "I should be disposed to say, that, unless it is organzine, it is not within the patent."

To this direction the counsel for the plaintiff excepted, insisting that any description of soft silk, though not organzine, was within the patent and the license.

The jury having returned a verdict for the defendants, the case came before this court by writ of error, and was argued in Trinity vacation last, before PARKE, B., PATTESON, J., ALDERSON, B., WILLIAMS, J., COLERIDGE, J., WIGHTMAN, J., ROLFE, B., and PLATT, B.

M. Smith, (with whom was *Webster*), for the plaintiff. (a) The exception amounts to this,—that the learned judge, in his direction to the jury, put too limited a construction upon the specification. It appeared from the evidence that there are other kinds of soft silk besides organzine. The point, therefore, which the jury had to determine upon this specification, *458] was, whether the silk *used in the manufacture of the material for covering the buttons in question was not organzine, or soft silk of some other description, such as was in use for the weaving of satin. There was abundant evidence to satisfy the jury that the article used by the defendants, and called by them *Italian twist*, was soft silk substantially within the meaning of the specification. [PATTESON, J. Was there any evidence to show that there was any species of soft silk besides organzine, used for the warp in the making of satin, at the date of the plaintiff's patent?] It was proved that tram slightly twisted was a kind of soft silk, though it was not distinctly shown to have been used for the warp in the weaving of satin. Soft silk, in truth, is any description of silk slightly twisted. That was an admitted fact in the case. The learned judge should have left it to the jury to say whether or not the defendants' button cloth was made of organzine, or of soft silk, and was a satin fabric intended to resemble the cloth made under the plaintiff's patent. [PARKE, B. The question is, whether the patentee does not, by his specification, limit his claim to organzine or such soft silk as was then in use for the warp in the weaving of satin.] Reading the specification either with or without the evidence, the construction put upon it by the learned judge was clearly too limited.

Sir *T. Wilde*, Serjt., (with whom were *Rotch* and *H. Hill*), *contrá*. As a general rule, no doubt, the construction of the specification is for the court. But recourse may be had to evidence as to the state of a particular trade or manufacture at the date of the patent, in order to fix the sense in which certain words are used in the specification. Here, all the evidence showed, beyond a shadow of doubt, that, at the date of this *459] patent and specification, satin had never been made *of any other than organzine, for the warp; and that organzine and soft silk

(a) The point marked for argument on the part of the plaintiff, was as follows:—“That soft silk suitable for making satins, and organzine silk suitable for making satins, and any silk counterfeiting, imitating and resembling such soft and organzine silk, are within the license and letters-patent, or one of them.

were, for this purpose, synonymous terms. The jury were expressly told that they were not to take the word "organzine" in its strictly technical sense ; and the answer given by the learned judge to the question put to him by the foreman of the jury, must be taken in conjunction with the rest of his summing up, and not as giving the sole effect and necessary construction of the specification.

M. Smith, in reply. The word "soft" is clearly introduced into the specification for the purpose of denoting something other than and besides organzine. [PATTESON, J. It is difficult to see what else besides organzine can have been intended by the word "soft," the evidence showing, that, at the date of the patent and specification, no other description of silk than that called organzine was used for the warp in weaving satin.] The direction particularly excepted to was eminently calculated to mislead the minds of the jury from the true question they had to determine, and this is ground for the allowance of the exception : *per* Lord BROUGHAM, in *The Househill Company v. Neilson*, 1 Webster's P. C. 712.

Cur. adv. vult.

PARKE, B., now delivered the judgment of the court.

The question in this case arises upon an exception to the direction of my brother *Coltman*, in an action tried before him on a covenant by the defendants to pay to the plaintiff, the patentee, a stipulated allowance for all buttons made by the defendants according to the plaintiff's patent, pursuant to a license. The issue was, whether certain buttons made by the defendants, called **Italian* twist dress buttons, were made under [460 the license to use the plaintiff's patent.

The material parts of the specification are as follows :—"The third part of my invention, being the application of such fabrics only wherein the ground or face of the ground thereof is produced by a warp of *soft or organzine silk, such as is used in weaving satin*, and the classes of fabrics produced therefrom." And again,—“Thirdly, I claim the application of such figured woven fabrics to the covering of buttons with flexible shanks, made by pressure in dies, as have the ground or face of the ground woven with *soft or organzine silk* for the warp, when such fabrics have ornamental designs or figures for the centres of buttons.”

On the trial, much evidence was given on both sides ; the witnesses for the plaintiff stating that the buttons of the defendants were made with organzine silk ; those for the defendants, that they were not ; but the latter deposed that the buttons were made of a material called twist, which might be termed *soft* silk ; organzine being a species of silk thread in which there is a spire or twist of each of the threads singly, before they are twisted together ; and twist being a description of silk in which two or more threads are twisted together, each thread not having been previously twisted.

The learned judge summed up the evidence to the jury on both sides, leaving to them the question whether the buttons made by the defendants

were made of soft or organzine silk, within the meaning of that part of the specification.

At the close of the summing up, the foreman of the jury said it would much assist the jury, if the learned judge would tell them how they were to interpret the word "or" in the specification—whether it was disjunctive, or whether "organzine" was the construction of the word "soft;" *461] and thereupon the learned judge *gave it as his opinion, that, unless the silk was organzine, it was not within the patent. The counsel for the plaintiff excepted to that opinion, and insisted that "soft silk," although not "organzine," *was* within the patent and license.

We are all of opinion that the exception was well founded, and that the direction of the learned judge was not correct.

The word "or," in its ordinary and proper sense, is a disjunctive particle; and the meaning of the term "soft or organzine, is, properly, either one or the other; and so it ought to be construed, unless there be something in the context to give it a different meaning, or unless the facts properly in evidence, and with reference to which the patent must be construed, should show that a different interpretation ought to be made.

There was nothing in the context to lead to a different construction of the words; but the facts might be such, that, applying the specification of the patent to them, the word "or" ought to be construed, not in its proper sense, but as giving another description of the same thing, and the words read as if they had been "soft, *otherwise called* organzine, silk:" and, if the fact was, that, at the date of the specification, organzine was the only species of soft silk in known use in weaving satin, that would be a sufficient ground for construing the specification, which applies to such soft or organzine silk as was then used, to mean to apply to "soft, *alias* organzine silk," and include organzine only. But, if there was soft silk, as well as organzine, used for the purpose at the time of the specification, then the words must be construed in their proper sense, and both species would be within the patent.

The interpretation, therefore, which the learned judge put upon the specification was not correct, unless the facts were such as to lead to it; *462] and those facts were *for the determination of the jury. The learned judge should not have told the jury, *absolutely*, that soft and organzine silk were the same: he should have stated that the words were *capable* of being so construed, if the jury were satisfied, that, at the date of the specification, only one description of soft silk, and that organzine, was used in satin weaving; but, otherwise, that the proper and ordinary sense of the words was to be adopted, and the patent held to apply to every species of soft silk, as well as to organzine silk. It was argued that the learned judge's observations must be understood in connection with the facts proved at the trial, and that it proved the fact that organzine was the only known species of soft silk used in weaving satin at the date of the specification. But the answer is, that it is the bill of exceptions

only that states the evidence : none of the other facts proved at the trial are found by the jury ; and none of them can be assumed to be true ; and, as the construction of the specification depended on the facts, the question as to the truth of those facts should have been left to the jury.

There must therefore be a *venire de novo*. *Venire de novo.* (a)

(a) Upon the second trial, at the sittings at Westminster after Trinity term, 1846, the jury returned a verdict for the plaintiff; which verdict the defendants did not seek to disturb.

END OF MICHAELMAS VACATION. (b)

(b) For the registration cases, decided, in Michaelmas term, on appeals from the decisions of revising barristers, see *antè*, p. 1—59.

C A S E S

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

AND

UPON WRITS OF ERROR FROM THAT COURT

TO THE

EXCHEQUER CHAMBER,

IN

Hilary Term,

IN THE NINTH YEAR OF THE REIGN OF VICTORIA.

The judges who usually sat in banco in this term, were.

TINDAL, C. J.
COLTMAN, J.

ERLE, J.
CRESSWELL, J.

LEWIS *v.* Lord KENSINGTON. *Jan.* 12.

In the attestation of the execution of a warrant of attorney or cognovit, under the 1 & 2 Vict. c. 110, s. 9, it is not necessary that the precise words of the statute should be followed: it is enough if it appears by necessary inference, that the witness attended as the attorney for the party, at his request, and that he subscribed his name as such attorney.

An attestation in the following form—"Signed, sealed, and delivered in the presence of E. F., attorney for the said C. D., and expressly named by him, and attending at his request. And I hereby subscribe myself to be the attorney for him, having read over and explained to him the nature and effect of the above warrant of attorney, before the same was executed by him; and I hereby subscribe my name as a witness to the due execution thereof." The signature was of the proper handwriting of E. F., the attorney. *Held*, a sufficient compliance with the statute.

TALFOURD, Serjt., in Trinity term last, moved for a rule nisi to set aside a warrant of attorney given by the defendant, and the judgment signed *464] thereon, *upon the ground that it was not properly attested pursuant to the 1 & 2 Vict. c. 110, s. 9. The attestation was as follows:—"Signed, sealed, and delivered in the presence of Henry Whitaker, 10, Lincoln's Inn, attorney for the said William Lord Kensington, and expressly named by him and attending at his request. And I hereby

subscribe myself to be the attorney for him, having read over and explained to him the nature and effect of the above warrant of attorney, before the same was executed by him. And I hereby subscribe my name as a witness to the due execution thereof."

The attestation clause was a printed form, with a blank for the name of the attorney. There was no affidavit that the name "Henry Whittaker," at the end of the first sentence of it, was not the handwriting of that gentleman. [CRESSWELL, J. The statute requires that there shall be present an attorney on behalf of the defendant, and that he shall be expressly named by him, and shall attend at his request to inform him of the nature and effect of the instrument. It is not denied that all this has been done. The act further requires the attorney to subscribe his name as a witness to the execution of the instrument. Here, he has done so. And he is to declare himself to be attorney for the defendant, and state that he subscribes as such attorney. Has he not done all that? MAULE, J. The attesting witness has done all that the statute requires, and something more. This objection therefore fails.] The attestation clause is not *subscribed* at all. The witness does not pledge himself to a *subscription as attorney* for the party. He merely subscribes himself *to be* the attorney. In *Poole v. Hobbs*, 8 Dowl. P. C. 113, an attestation to a cognovit in this form—"Witness, G. E., defendant's attorney, named by him, and attending at his request"—was held not sufficient, *the statute requiring that the attorney should proceed to declare that [*465 he *subscribes as such attorney*. So, in *Everard v. Poppleton*, 5 Q. B. 181, a warrant of attorney to confess judgment was attested by an attorney as follows: "Signed by the above-named G. C. P., in the presence of us, of whom the said J. H. S. is the attorney expressly named by him, and *acting* at his request, and by whom the above-written warrant of attorney was read over, and the nature and effect thereof explained to the said G. C. P., before the execution thereof by him:" Signed "J. H. S., attorney:" and this was held an insufficient attestation, for want of a statement that J. H. S. subscribed as attorney for G. C. P. Lord DENMAN there says: "I think the reasons which led to demanding an exact compliance with the statute, are both cogent and sensible. This case, however, does not raise the point: for, 'acting' is really the same thing as 'attending.' The attorney attending may stop short in his agency, before the attestation; so may the attorney who is acting. I should like to see the words of the statute always literally followed; nothing is more unfortunate than a disturbance of the plain language of the legislature by the attempt to use equivalent terms. I think the view taken in *Poole v. Hobbs* was perfectly sound; and I regret that it should be supposed that there has been any disposition to recede from the language there used." Here the words are not followed.

A rule nisi having been granted,

Sir T. Wilde, and Channell, Serjts., in Michaelmas term, showed cause.

The ninth section of the 1 & 2 Vict. c. 110, enacts that "no warrant of attorney to confess judgment in any personal action, or *cognovit* *466] **actionem*, given by any person, shall be of any force unless there shall be present some attorney of one of the superior courts on behalf of such person, expressly named by him, and attending at his request, to inform him of the nature and effect of such warrant or cognovit, before the same is executed; which attorney shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney." All that the statute requires is an attestation by an attorney attending on the part of the defendant, of the due execution by him of the warrant or cognovit. The seventeenth section of the statute of frauds, 29 Car. 2, c. 3, upon a contract for the sale of goods, required a memorandum in writing of the bargain. Not only must this memorandum contain all the terms of the contract between the parties, but it must be signed by the parties to be charged thereby, or by their agents thereunto lawfully authorized. That would imply a signature adopting all the material terms of the contract, including price. And it has been held that a bill of parcels, in which the name of the vendor is printed, and that of the vendee written by the vendor, at the top of the paper, is sufficient to charge the vendor: *Saunderson v. Jackson*, 2 B. & P. 238, 3 Esp. N. P. C. 180; *Schneider v. Norris*, 2 M. & Sel. 286. Before the recent statute, 7 W. 4, & 1 Vict. c. 26, a will was not unfrequently signed by the testator otherwise than at the end: the express provision in that statute that all wills shall be "signed at the foot or end thereof," is a sort of recognition of the validity antecedently of a signature at any other part of the document. In the present case, the object the act had in view, viz., the protection of the party from fraud, is amply attained by the form of attestation adopted. One who signs *himself "A. B., attorney *467] for C. D.," does most clearly and emphatically declare that he is the attorney of C. D. There are, undoubtedly, cases which show that the courts have endeavoured to enforce a strict and literal compliance with the statute. Thus, in *Poole v. Hobbs*, COLERIDGE, J., says: "The attorney is not only to subscribe himself as the attorney, but is to declare that he so subscribes himself." And afterwards, in delivering judgment, he says: "Taken literally, it would not be very easy to comply with the enactment, but the intended meaning seems clear, that, in the course, or as part of the attestation, the witness is to declare that he is the party's attorney, and also state that he subscribes as such attorney." There is often infinitely more difficulty and danger in requiring a literal compliance with a statute than a substantial one. In *Potter v. Nicholson*, 8 M. & W. 294, Lord ABINGER says: "The introduction of the word 'thereby' into the statute is very important. It shows an intention to carry the rule further, by requiring that the declaration by the attorney of his being the attorney of the person executing the cognovit, and the statement that he

‘subscribes as such attorney,’ shall actually be part of the attestation itself. The word ‘thereby’ seems to have been used *ex industria* to procure that form of attestation.” And in *Elkington v. Holland*, 9 M. & W. 659, ALDERSON, B., says: “Every attorney who witnesses an instrument of this nature should declare in the attestation, not only that he is the attorney attending on behalf of the party executing the instrument, but that he subscribes his name thereto as such attorney.” Neither these cases nor that of *Everard v. Poppleton* present the question that arises here, viz., whether in point of reasonable construction enough is not done to satisfy the statute. In *Knight v. Hasty*, 12 Law J., N. S., Q. B. 293, an attestation “to a warrant of attorney, containing the words ‘in the presence of me, J. N., the attorney of the said W. H.,’” [*468] was held sufficiently to declare that J. N. was the attorney for W. H., to satisfy the statute. And COLERIDGE, J., observed: “It is said in *Potter v. Nicholson*, that I said in *Poole v. Hobbs*, that there must be a literal compliance with the statute. I cannot say whether I did or not: perhaps I said that the attestation should follow the words of the statute as nearly as it could; but the principle of what I said is, that there should be no necessity to have recourse to parol evidence: if I said that the statute was to be literally complied with, I said more than I intended: and my brother PARKE finds fault with my decision in the subsequent case of *Elkington v. Holland*. There is hardly any case in which a statute is to be literally complied with. The question is, whether the attorney has not made the declaration required by the statute: are not the words, ‘In the presence of me, J. Nutt, the attorney of the said W. Hasty,’ a declaration that he is the attorney of W. Hasty? If it had been, ‘who am the attorney,’ it would have been sufficient; and these words have exactly the same meaning.” Here, taking the whole attestation clause together, it does clearly comply with the statute. The statement that Whittaker subscribes himself to be the attorney for the party, is as plain a declaration that he is such attorney as any reasonable person can require. The signature was attached after all the rest of the attestation was printed. If any part of the attestation, therefore, was false, the mode of introducing the signature would not protect the party from the consequences.

Talfourd, Serjt., (with whom was *Peacock*), in support of the rule. The object of the statute was, as is observed by COLERIDGE, J., in *Poole v. Hobbs*, “to prevent *the necessity of any recourse to parol evidence to ascertain whether the witness is the attorney of the party or not.” [*469] And, in order to attain that object, the attorney must expressly declare that he subscribes as such attorney; and he must so subscribe as to show that he unequivocally adopts the whole attestation. Here there is no declaration by Whittaker of any fact subsequent in point of position to his signature; it is only by parol evidence that he can be at all identified with it. There might be enough to satisfy a jury that he intended to pledge himself to the whole. But that is not enough. Assuming that

Whittaker's name appeared at the bottom of the attestation clause, there is nothing to indicate a subscription by him as Lord Kensington's attorney. *Potter v. Nicholson* is a distinct authority to show that to be essential. There is no difficulty in following the very words of the statute. [ERLE, J. The parties seem to have most studiously sought to disarm objection. TINDAL, C. J. In *Potter v. Nicholson*, the attestation did not even state the witness to be the attorney for the defendant.] That blot is not touched by the judgment of the court. [TINDAL, C. J. Here, the question is, whether this attestation clause does not, by necessary construction, state that Whittaker subscribes "as such attorney."] In *Hibbert v. Barton*, 10 M. & W. 678, the attestation was as follows:—"Witnessed by me, W. R., as the attorney of the said A. B., attending at the execution hereof at his request, and expressly named by him:" and it was held insufficient; for, that the attestation ought to contain words which show, with certainty, that the subscribing witness is the attorney of the party executing the instrument, and that he attests or subscribes the execution *as such attorney*. Lord ABINGER there says: "I do not say that this *470] attestation would *not be *prima facie* evidence of Pemberton's being the attorney of the defendant, or possibly even sufficient to warrant a verdict against him in an action for negligence. But in this section the legislature requires something more, and provides, not only that the party executing a cognovit or warrant of attorney shall have an attorney employed by himself present attending the execution of the instrument, in order to acquaint him with the nature and consequences of the act he is about to do; but, further, that the attorney so attending shall subscribe his name to the document as a witness to the due execution thereof, and thereby, that is to say, by such attestation or subscription of his name, declare himself to be such attorney, and that he subscribes the paper as such: in a word, he must not only *be* the attorney employed at the time, and *declare himself such* by his attendance, but he must *subscribe his name as such*. The legislature requires two things to be done, one of which might perhaps have been dispensed with; but, as they require two, we are not at liberty to say, that, in prescribing either, they use redundant words, and that a compliance with the other only is sufficient. I think, therefore, that the safest rule for us to follow will be, to construe the act literally, and say, that, although we may not see the use of this double provision, still, as the legislature requires it, we must enforce it." And PARKE, B., adds: "Although I have hitherto entertained considerable doubt on this question, and have some little still, I think, upon the whole, the better course will be to follow the words of the act of parliament, according to their common and ordinary construction. It is enough, therefore, for me to say at present, that, as I cannot by necessary inference collect from the words used in this attestation, namely, that the *471] attesting witness signed it 'as attorney' for the party *executing the cognovit, that he *was* the attorney acting for that party

throughout the transaction, I think I am bound to hold this attestation insufficient." It is clear that equivalent language will not do. The two facts required by the statute must appear by express statement, or, at all events, by necessary inference. *Cur. adv. vult.*

TINDAL, C. J., now delivered the judgment of the court.

The question in this case is, whether a warrant of attorney executed by Lord Kensington was properly attested, within the meaning of the statute 1 & 2 Vict. c. 110, s. 9. By that act it is provided that no warrant of attorney or cognovit shall be of any force, "unless there shall be present some attorney of one of the superior courts on behalf of such person, expressly named by him, and attending at his request to inform him of the nature and effect of such warrant or cognovit before the same is executed; which attorney shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney."

The act, therefore, requires the attorney so named to be present and acting on behalf of the defendant, both before and at the time of the execution of the warrant of attorney and also afterwards, when he gives authenticity to the execution by signing his name as a witness; and, in order to secure this, the act directs that he shall, in the attestation, declare that he is the attorney of the defendant, and state that he subscribes as such attorney.

In the present case the attestation was as follows:—"Signed, sealed, and delivered in the presence of H. Whittaker, *10 Lincoln's Inn, attorney for the said Lord Kensington, expressly named by him, and attending at his request; and I hereby subscribe myself to be the attorney for him, having read over and explained to him the nature and effect of the above warrant of attorney, before the same was executed by him; and I hereby subscribe my name as a witness to the due execution thereof." [*472]

To this attestation two objections were taken. It was contended, first, that there was no proper subscription of his name by the attesting witness, the name appearing in the middle of the attestation, and not at the end of it, and that it is uncertain whether the words subsequent to the name "H. Whittaker," are to be considered as the words of Whittaker or not. But it must in all cases be a matter of extrinsic proof, whether the name of the attesting witness is in his handwriting; and, in the present case, it appears that the name, "H. Whittaker," was in the proper handwriting of the witness: and it seems to us that the precise place where the name is written, is not material, so long as it appears upon the face of the attestation, that the attestation contains an assertion that all has been done by the witness which the act requires; for, the act does not require the witness to subscribe his name at the foot of the attestation, but only that he shall subscribe his name as a witness to the due execution thereof; and therefore the name seems to us not inaptly to be placed immediately after

the words "signed, sealed, and delivered;" and, as there is no other subscribing witness than Whittaker, it is clear that the concluding words, "I hereby subscribe my name as a witness to the due execution thereof," must be taken to be the words of the witness, who is the only person speaking; and, consequently, in conformity to the ordinary rules of grammatical construction, the preceding words, "I *hereby subscribe myself to be the attorney," &c., must also be taken to be his words. This objection, therefore, we think, ought not to prevail.

The second and principal objection was, that the attestation did not comply literally with the act of parliament; as it was said that it neither contained a declaration by the witness that he was the attorney, nor a statement that he had subscribed it as such attorney. In support of this objection various cases were cited, all of which, however, may, we think, be distinguished from the present. The first was *Poole v. Hobbs*, 8 Dowl. P. C. 113. In that case, the attestation was as follows:—"Witness, George Edwards, defendant's attorney, named by him, and attending at his request." The attestation in that case contained no express statement that the witness subscribed as the attorney for the defendant, nor any thing that could be considered as equivalent. The next case cited was *Potter v. Nicholson*, 8 M. & W. 294. The attestation was as follows:—"Joseph Bamford, one of the attorneys of her majesty's court of Exchequer of Pleas at Westminster, attending for the said William Nicholson, at his request, to, and did, inform him of the nature and effect of the above cognovit before the execution thereof by him." This attestation was also defective, as it did not state that he subscribed as such attorney. The next case cited was *Elkington v. Holland*, 9 M. & W. 659, 1 Dowl. N. S. 643. The attestation in that case was as follows:—"Signed, sealed, and delivered by the said Joseph Ankers in my presence; and I subscribe myself as attorney for the said Joseph Ankers, expressly named by him to attest the execution of these presents." This attestation was held insufficient, by ALDERSON, B., because it did not contain any express statement that Ankers was the attorney; the statement *474] that he *subscribed as* the *attorney not amounting to a declaration that he *was* the attorney. The next case cited was *Everard v. Poppleton*, 5 Q. B. 181. The attestation there was—"Signed, sealed, and delivered by the above-named George Charles Poppleton, in the presence of us, of whom the said John Hope Shaw is the attorney expressly named by him, and acting at his request, and by whom the above-written warrant of attorney was read over, and the nature and effect thereof explained to the said George Charles Poppleton before the execution thereof by him. John Hope Shaw, attorney, Leeds. John Richardson." This attestation was also held defective, as not containing any statement that the witness subscribed as such attorney. The last case, and the one most relied upon, was, *Hibbert v. Barton*, 10 M. & W. 678, 2 Dowl. N. S. 434. The attestation in that case was as follows:—

“Witnessed by me, W. Pemberton, as the attorney of the said William Barton, attending at the execution hereof at his request, and expressly named by him. William Pemberton; Prescott, Lancashire.” The objection urged, (and which the court appears to have acceded to,) was, that the attestation did not contain an express allegation that the witness was the attorney employed in the transaction, but only a statement that he witnessed it *as the attorney*.

The present case, however, is, we think, distinguishable from all these cases; for, the attestation contains, first, the words “signed, sealed, and delivered in the presence of H. Whittaker, attorney for the said Lord Kensington, expressly named by him, and attending at his request:” and this appears to us a sufficient allegation of his being the attorney employed in the business by Lord Kensington; and for this the case of *Knight v. Hasty*, 12 Law Journ., N. S., (Q. B. Bail Court, 9th May, 1843,) 293, is an express authority. And we think that *the words [475 immediately following the signature, “I hereby subscribe myself to be the attorney for him,” are equivalent to an allegation that he subscribes as such attorney.

We think, therefore, that, in this case, there has been a substantial compliance with the requisitions of the statute, and that the rule ought to be discharged; and, as there is no justice in the defendant’s complaint, that it should be discharged with costs.

Rule discharged with costs.(a)

(a) And see *Cottam v. Partridge*, 4 M. & G. 271, 4 Scott, N. R. 819; *Pryor v. Swaine*, 2 Dowl. & L. 37.

The provisions of the 1 & 2 Vict. c. 110, s. 9, apply to warrants of attorney executed abroad. *Davis v. Trevanion*, 2 D. & L. 743.

*BURN v. BOULTON. Jan. 13.

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Semble, that, where there are two clear and undisputed debts, the case is not taken out of the statute of limitations, as to either debt, by evidence of a part payment within six years, not specifically appropriated to the one debt or to the other.

To debt for principal and interest on a promissory note for 130*l.* dated in 1827, with a count for work and labour, the defendant, in 1845, pleaded, respectively, *non fecit*, and *nunquam indebteditatus*, and, to the whole, the statute of limitations. At the trial the note was duly proved; and it appeared, that, in 1834, there had been a settlement of interest thereon, but, that although small sums of money had occasionally been handed by the defendant to the plaintiff, there had been no *specific* payment on account of the note since that period.

Besides the principal and interest on the note, the plaintiff claimed to be entitled to recover wages as a domestic servant from 1827 to October, 1844. There was conflicting evidence as to the terms upon which the plaintiff, who was a distant relation of the defendant, had become an inmate of his house, the defendant insisting that there had been no contract for wages, and that the occasional payments relied on by the plaintiff were mere donations.

The jury returned a verdict for the plaintiff for wages, at the rate of 7*l.* *per annum* for the first eleven years, and at 5*l.* *per annum* for the last six; and as to the count on the note, it was reserved for the court to say whether or not there was *any* evidence from which a jury would be warranted in inferring that the payments proved had been made on account of the debt due on the note; with liberty to the defendant to move to reduce the verdict:—

Held, that, inasmuch as the defendant had, throughout, denied the existence of any debt for wages, the jury were warranted in finding the payments to have been part-payment on account of the note; and, consequently, that the plaintiff was entitled to retain his verdict in respect of so much of the issues as related to the first count, and for wages for the last six years in respect of those parts of the issues which related to the second count.

DEBT. The first count was upon a promissory note, dated the 15th of August, 1827, made by the defendant in favour of the plaintiff, for 130*l.*, with interest at 4½ per cent., payable on demand. There were also counts for work and labour, money lent, and money due upon an account stated.

The defendant pleaded—first, to the first count, that he did not make the note—secondly, to the subsequent counts, *nunquam indebitatus*—thirdly, to the whole declaration, the statute of limitations.

*477] The cause was tried before ERLE, J., at the sittings in *London after Trinity term last. It appeared that the action was brought to recover 234*l.* 12*s.* 8*d.*, principal and interest, alleged to be due upon the promissory note, and seventeen years' wages alleged to be due from the defendant to the plaintiff as a domestic servant.

The facts of the case were these:—The plaintiff, who had formerly been a nurse in a lunatic asylum at Manchester, and was distantly related to the defendant, some time in the year 1827, went to his house to attend upon a relation who lived with him, and was of unsound mind. The plaintiff, having 130*l.* in a bank at Manchester, drew out that sum, and deposited it with the defendant, receiving from him the promissory note mentioned in the declaration. After the decease of the person whom she originally came to attend, the plaintiff continued to reside with the defendant, and remained with him until October, 1844. There was no distinct evidence of the character in which the plaintiff so remained in the defendant's family; but it appeared that she made herself generally useful in the house, and that she took her meals sometimes with him and sometimes in the kitchen. It also appeared that, in 1834, there had been a settlement between the plaintiff and the defendant of the amount due for interest on the note; no claim being then made by the plaintiff in respect of wages.

To take the case out of the statute of limitations, the plaintiff relied upon the evidence of Anne Boulton, the defendant's daughter, who stated that the defendant was in the habit of giving the plaintiff small sums of money whenever she asked for it, and that, on the 11th of October, 1844, when the plaintiff was about to leave the defendant's house, the defendant offered her two sovereigns, of which she took only one. The defendant never on any occasion admitted that the plaintiff was entitled to wages, but, on the contrary, asserted that she resided with him merely as a friend, *478] and that the *small services that a person of her advanced age was capable of rendering, were amply compensated by her board and lodging.

On the part of the defendant it was insisted, upon the authority of *Typpets v. Heane*, 1 C., M. & R. 252, 4 Tyrwh. 772, that there was no evidence

to take the case out of the statute, inasmuch as it was not shown that the payments spoken of were made specifically on account of the note.

The learned judge suggested that the plaintiff should have a verdict for the amount claimed for principal and interest on the note, subject to the opinion of the court as to whether or not there was any evidence of a part-payment in respect of that debt. This suggestion being acceded to by the counsel on both sides, the learned judge left it to the jury to say whether or not there had been any service on the part of the plaintiff upon a contract, or understanding, that she was to receive wages, and, if so, what, under the circumstances, would be a reasonable compensation for such services as she appeared to have rendered; and whether or not there had been any part-payment on account of wages, within six years.

The jury returned a verdict for the plaintiff for 341*l.* 12*s.* 8*d.*, being 234*l.* 12*s.* 8*d.* for principal and interest on the note, 77*l.* for wages for the first eleven years of the plaintiff's residence with the defendant, at 7*l.* *per annum*, and 30*l.* for the last six years, at 5*l.* *per annum*. And leave was reserved to the defendant to move to reduce the verdict to 30*l.*

Byles, Serjt., in Michaelmas term last, accordingly obtained a rule nisi to reduce the verdict by the amount of the note and interest, or by the eleven years' wages, or by both sums. The 30*l.* had already been paid *under an order for speedy execution. He cited *Tippets v. Heane*, *Mills v. Fowkes*, 5 N. C. 455, 7 Scott, 444, and *Waugh v. Cope*, 6 M. & W. 824. [*479]

Shee, Serjt., (with whom was *Lush*,) now showed cause. After the cases of *Tippets v. Heane*, *Mills v. Fowkes*, and *Waugh v. Cope*, it is impossible to contend that there was evidence of any payment to take the case out of the statute, in respect of services rendered by the plaintiff beyond six years from the commencement of the action. But, as to the promissory note, the case is different. It was distinctly proved, that, when the plaintiff first went to reside with the defendant, she deposited with him 130*l.*, upon his promissory note, payable on demand, with interest at 4½ per cent.; that interest was paid upon the note down to the year 1834; that various small sums were from time to time paid by the defendant to the plaintiff; and that, in October, 1844, the last payment of 1*l.* was made. These payments would, in the absence of any specific appropriation by the parties, appropriate themselves to the older debt,^(a) viz., that upon the promissory note. The presumption, therefore, would be, that they were part-payments on account of the note. Besides, the defendant's whole case was based upon the assumption that there was no debt at all due for wages. It is, therefore, not competent to him now to suggest that the payments were made on account of a debt, the existence of which he denies, when there was a debt clearly and unequivocally due, to which they may be ascribed. [ERLE, J. If there was a *scintilla* of

(a) See *Clayton's case*, in *Devaynes v. Noble*, 1 Merivale, 604; *Biggs v. Dwight*, 1 Mann. & R. 308, 4 N. & M. 17, n.

evidence from which the jury *could* find the 1*l.* given to the plaintiff on the 11th of October, 1844, to have been a part-payment on account of the *480] *note, it is, by the agreement of the parties, to be taken that they have so found.] There clearly was *some* evidence to warrant the jury in finding the payments made to have been on account of the note.

Byles, Serjt., (with whom was *R. Miller*,) in support of the rule. There was *no* evidence to go to the jury of any part-payment specifically made on account either of the promissory note, or of that portion of the claim for wages that accrued more than six years before the commencement of the action. By the 9 G. 4, c. 14, s. 1, "in actions of debt or upon the case, grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments or either of them, or to deprive any party of the benefit thereof. unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby:" "provided always, that nothing herein contained shall alter, or take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever." *Willis v. Newham*, 3 Y. & J. 518, and other cases,^(a) have decided that a verbal acknowledgment of payment of a part of a debt within six years, is not sufficient (within the 9 G. 4, c. 14) to take the case out of the statute of limitations. [TINDAL, C. J. You may prove the payment by the testimony of a witness who saw the money handed over.] To give a part-payment the effect of taking a case out of the statute, it must be shown to have been expressly made in respect of the *481] particular debt which it is sought to take out of the statute, and *in part payment of that debt: *Tippets v. Heane*, 1 C., M. & R. 253, 4 Tyrwh. 772. PARKE, B., there says: "In order to take a case out of the statute of limitations by a part-payment, it must appear, in the first place, that the payment was made on account of a debt. That was left in ambiguity in the present case. Secondly, it must appear that the payment was made on account of the debt for which the action is brought. Here, the evidence does not show any particular account to which the payment was applicable. The jury seem to have considered it as a payment of part of the debt in question; and, perhaps, as there was no other account found to have been in existence between the parties, they might be warranted in so doing. But the case must go further: for, it is necessary, in the third place, to show that the payment was made as part-payment of a greater debt; because the principle upon which a part-payment takes a case out of the statute, is, that it admits a greater debt to be due at the time of the part-payment. Unless it amounts to an admission that more is due, it cannot operate as an admission of any still existing debt." The present case differs from

(a) See *Bayley v. Ashton*, 12 Ad. & E. 493, 4 P. & D. 204; *Maghee v. O'Neil*, 7 M. & W. 531

Tippets v. Heane, in this, that, in the latter, there was only one account. [MAULE, J. The payment there was only an admission of a debt to the extent of the sum paid: there was no evidence that the money was given as part-payment of a debt of a larger amount. Here, there was a debt admitted at once to exist, viz., for principal and interest on a promissory note. There was no plea of payment, no evidence that that debt had ever been satisfied. The debt on the note was a specific and agreed debt. A payment on an account not ascertained and agreed is no admission of the amount of the debt. But, if a smaller sum be paid on account of a larger ascertained debt, it admits that *something more is due.] [*482 In *Mills v. Fowkes*, 5 N. C. 455, 7 Scott, 444, it was held, that, where a creditor has two several demands against his debtor, one barred by the statute of limitations, the other not, a part-payment, to take the case out of the operation of the statute, must be expressly made on account of the older debt—following the decision in *Tippets v. Heane*. In *Waugh v. Cope*, 6 M. & W. 824, the plaintiff, an attorney, had done professional business of various kinds for the defendant, in 1827 and several subsequent years. In July, 1832, the defendant having been a witness on a lunacy inquiry, in which the plaintiff was concerned as solicitor, the plaintiff wrote to him to ask what were his expenses on that occasion. The defendant in reply requested the plaintiff to allow what was usual, and place the same to his (the defendant's) account. In March, 1833, the plaintiff wrote to the defendant, informing him that the sums allowed were 2l. 2s. and 10s. 6d., enclosing receipts for those sums for the defendant's signature, and concluding, "I will give you credit for the sums in my account against you, agreeably to your note of the 21st July last." The defendant returned the receipts signed by him, and the 2l. 2s. and 10s. 6d. were paid to the plaintiff on the production of those receipts. In 1838, the plaintiff delivered to the defendant a bill of costs amounting to 289l., the first item being in 1827, and the two last in 1830 and 1831: these two were charges for 3l. and 5l. cash lent; the rest of the bill was for professional business. In an action on this bill, commenced in January, 1839, it was held that the letters given in evidence did not sufficiently show that the 2l. 2s. and 10s. 6d. had been paid in part discharge of the debt for which the action was brought, so as to take the case out of the statute of limitations *as to any part of the demand. In [*483 delivering the judgment of the court, Lord ABINGER said: "Since Lord TENTERDEN's act, after the six years have elapsed, nothing will revive the debt, except an acknowledgment in writing from which a promise to pay can be inferred, or a part-payment of principal or interest. Now, there have been several cases in which it has been considered, after much discussion, and adopted by all the courts, that the payment must appear, either by the declarations or acts of the party making it, or by the appropriation of the party in whose favour it is made, to be made in part payment of the debt in question: if it stands ambiguous, whether it be

part-payment of an existing debt, or payment generally, without the admission of any greater debt as due to the party;—if it may have been made by the party paying in reduction of an account due to himself, or intended to satisfy the whole of the demand against him; then it is not sufficient to bar the statute of limitations.” These cases show, that, if there be any other debt due besides the one on account of which the payment is alleged to have been made, the payment will not suffice to bar the statute, because, in order to have that effect, it must distinctly appear to have been a part-payment specifically on account of a larger ascertained debt. *Waters v. Tompkins*, 2 C., M. & R. 723, Tyrwh. & Gr. 137, 1 Gale, 323, is to the same purport. PARKE, B., there says: “The meaning of *part-payment* of the principal, is,—not the naked fact of payment of a sum of money, but payment of a smaller *on account of a greater sum* due from the person making the payment to him to whom it is made; which part-payment implies an admission of such greater sum being then due, and a promise to pay it: and *484] the reason *why the effect of such a payment is not lessened by the act, is, that it is not a *mere* acknowledgment by *words*, but it is coupled with a fact.” In the present case, there was not such evidence as the law requires to appropriate the payment in October, 1844, to the debt due upon the note, even if that had been the only debt. But it appeared that there was another debt, viz., the debt which the jury have found to be due for wages. There is nothing, therefore, to justify the conclusion that the payment was made on account of the note, rather than on account of the other debt. [CRESSWELL, J. How could the jury infer that the payment might have been made on account of wages, when the party making the payment denied the existence of any such debt?] The jury have in effect found that the 1*l*. was paid on account of the first eleven years’ wages. [MAULE, J. The finding of the jury cannot alter the effect of the compact you have entered into.]

TINDAL, C. J. The only question for our consideration in this case I take to be, whether or not there was any evidence to go to the jury of part-payments on account of the promissory note declared on. It appears to me that there was *some* evidence for them; and, if so, we cannot inquire whether or not they came to a right conclusion. It is clear that there was at one time a debt due from the defendant to the plaintiff, for which the defendant gave his promissory note for 130*l*. and interest at 4½ per cent., payable on demand: and this debt never could have been lost sight of by the defendant. There being this clearly admitted and ascertained debt, the ground upon which it is insisted that the subsequent payments do not operate to take the case out of the statute of limitations, is, *485] that there was then another debt due to the plaintiff for wages, and *therefore that it is at least uncertain to which of these debts the payments were intended to apply. I admit, that, if there was at the time a clearly ascertained debt for wages, and it was left in doubt on which of the two accounts the payments were made, such payments could not be

applied to the promissory note, so as to take it out of the statute. But no payment was ever made specifically on account of wages; and the jury would have been perfectly justified in finding that no wages were due at all. The defendant never admitted that any were due, and therefore was not likely to make a payment on account of wages. Then it appeared that, on the 11th of October, 1844, a sum of money was paid by the defendant to the plaintiff. It could not be said to have been a charitable donation. It does not at all bear the aspect of charity; for, when offered two sovereigns, the plaintiff, it seems, took only one, which is quite inconsistent with all one's notions and experience on that subject. Upon the evidence, therefore, no debt was admitted by the defendant but the debt on this promissory note: (a) and there was a consistent course of testimony from which the jury were well warranted in inferring that the payment of 1l. on the 11th of October, and the other payments subsequent to 1834, were made on account of the note. I therefore think there is no ground for disturbing the verdict.

MAULE, J. I am of the same opinion. There clearly was evidence for the jury upon the question whether or not the debt due from the defendant to the plaintiff was barred by the statute of limitations. That depended upon whether or not there had been part-payment within six years on account of a debt of a larger amount. It seems to me that all the requisites *for establishing the right of the plaintiff to a verdict upon this issue, exist in the present case. There was a debt of 130*l.* [*486 with interest at 4½ *per cent.* clearly proved—one clear, definite, and undisputed debt. The jury have found that there was also a sum due from the defendant to the plaintiff for wages: but that has no bearing upon the question whether or not there was evidence to go to them on the other point. Not only was the alleged debt for wages disputed at the trial, but it never had, in fact, been acknowledged. It was, at the least, an equivocal debt, that never could have been the subject of any expressly appropriated payment. The jury, therefore, found two debts; the one, a clear and recognised debt on the promissory note; the other, in respect of a liability which the defendant had never acknowledged. The defendant hands over money to the plaintiff, under circumstances which the jury, correctly, I think, have decided to be a payment in respect of a debt. The question is, whether there was any evidence to warrant the jury in inferring the payment to have been made on account of the note, rather than on account of the unacknowledged demand for wages. I think there was abundant evidence for the jury that the payment was on account of the debt which was not disputed. Then, was such payment an acknowledgment of a larger sum being due. Clearly it was. The evidence was, that there was a debt of 130*l.* and interest due from the defendant to the plaintiff on the promissory note. The part-payment on account was evidence of an admission of a specific debt, like a payment of money

(a) This was the older debt: vide *Dawe v. Holdsworth*, Peake, N. P. C. 64.

into court upon a special contract. If applicable to this debt at all, it is applicable to it as a debt of 130*l.* with interest at 4½ *per cent.* There being, therefore, clearly evidence to go to the jury, it is immaterial, for the purpose of the present inquiry, whether they have or have not come *487] to a right conclusion, or whether *we individually, if on the jury, would have done as they have done.

CRESSWELL, J. I shall confine myself entirely to the consideration whether or not there was any evidence of a payment on account of the promissory note. Though I have felt some doubt in the course of the argument, I cannot now say that there was not *some* evidence of a part-payment. It is said that the evidence leaves it ambiguous—whether the payment was made on account of the note or of some other debt. There being only one admitted debt, I think the jury might well infer that the payment had reference to that debt.

ERLE, J. If it had become necessary, I should have left it to the jury to say whether the payments were made in part-satisfaction of the principal or interest due upon the promissory note, severing the question on the wages from the demand on the note. The direction as to the wages would have been accompanied with the remark that the defendant had, throughout, denied the existence of any liability on that account.

The verdict, therefore, will be reduced by 77*l.*, the amount assessed by the jury for wages in respect of the first eleven years.

Rule accordingly. (a)

(a) See further as to appropriation of payments, *Anon.* Cro. EL 68; *Pinnel's case*, 5 Co. Rep. 117; *Bois v. Cranfield*, Style's Rep. 239; *Anon.* Comberb. 463; *Meggott v. Mills*, 1 Lord Raym. 286, 287; *Cases temp. King*, 41; *Stracy v. Saunders*, 7 Mod. 123; *Colt v. Nettervill*, 2 P. Wms. 308; *Goddard v. Cox*, Bull. N. P. 174, 2 Stra. 1194; *Morgan v. Jones*, 1 Brown Parl. Cases, 2d ed. 32; *Newmarch v. Clay*, 14 East, 239; *Eodenham v. Purchas*, 2 B. & Ald. 39; *Simpson v. Ingham*, 2 B. & C. 65, 3 D. & R. 249. And see 16 Vin. Abr. tit. *Payment*, *passim*.

*488] *HOLCROFT v. HOGGINS and Another. Jan. 13.

The fact of A.'s name appearing as proprietor of a newspaper, in the declaration filed at the stamp-office pursuant to the 6 & 7 W. 4, c. 76, ss. 6, 8, does not render A. liable in respect of a contract entered into specifically with B., the real proprietor of the newspaper, after A. has ceased to be interested therein.

ASSUMPSIT for work and labour. Plea, non assumpsit.

At the trial before ERLE, J., at the London sittings after last Trinity term, it appeared that the action was brought to recover 52*l.* 10*s.*, for articles written by the plaintiff for a newspaper called the Newcastle Advertiser and Commercial Herald, of which the defendants had been joint-proprietors, and were still so registered under the 6 & 7 W. 4, c. 76.

The contract under which these articles had been furnished, was made between the plaintiff and one Lowthin, who had become sole proprietor

of the newspaper on the 15th of June, 1844, after the defendants had ceased to be interested therein, though their names appeared upon the register at the stamp-office, and on the paper itself, as proprietors, until the 31st of December in that year.

On the part of the plaintiff, a certified copy of the declaration made and filed at the stamp-office, under the 6 & 7 W. 4, c. 76, ss. 6, 8, (a)

(a) The 6th section enacts "that no person shall print or publish, or shall cause to be printed or published, any newspaper before there shall be delivered to the commissioners of stamps and taxes, &c., or to the distributor of stamps or other proper officer appointed by the said commissioners for the purpose, in or for the district within which such newspaper shall be intended to be printed and published, a declaration in writing containing the several matters and things hereinafter for that purpose specified; that is to say, every such declaration shall set forth the correct title of the newspaper to which the same shall relate, and the true description of the house or building wherein such newspaper is intended to be printed, and also of the house or building wherein such newspaper is intended to be published, by or for or on behalf of the proprietor thereof, and shall also set forth the true name, addition, and place of abode of every person who is intended to be the printer or to conduct the actual printing of such newspaper, and of every person who is intended to be the publisher thereof, and of every person who shall be a proprietor of such newspaper who shall be resident out of the united kingdom, and also of every person resident in the united kingdom who shall be a proprietor of the same, if the number of such last-mentioned persons (exclusive of the printer and publisher) shall not exceed two, and, in case such numbers shall exceed two, then of such two persons, being such proprietors resident in the united kingdom, the amount of whose respective proportional shares in the property or in the profit and loss of such newspaper shall not be less than the proportional share of any other proprietor thereof resident in the united kingdom, exclusive of the printer and publisher, and also, where the number of such proprietors resident in the united kingdom shall exceed two, the amount of the proportional shares or interests of such several proprietors whose names shall be specified in such declaration; and every such declaration shall be made and signed by every person named therein as printer or publisher of the newspaper to which such declaration shall relate, and by such of the said persons named therein as proprietors as shall be resident within the united kingdom; and a declaration of the like import shall be made, signed, and delivered in like manner, whenever and so often as any share, interest, or property soever in any newspaper named in any such declaration shall be assigned, transferred, divided, or changed by act of the parties or by operation of law," &c.

And the 8th section enacts, "that all such declarations as aforesaid shall be filed and kept in such manner as the commissioners of stamps and taxes shall direct for the safe custody thereof; and copies thereof, certified to be true copies as by this act is directed, shall respectively be admitted, in all proceedings, civil and criminal, and upon every occasion whatsoever, touching any newspaper mentioned in any such declaration, or touching any publication, matter, or thing contained in any such newspaper, as conclusive evidence of the truth of all such matters set forth in such declaration as are thereby required to be therein set forth, and of their continuance respectively in the same condition down to the time in question, against every person who shall have signed such declaration, unless it shall be proved that previous to such time such person became lunatic, or that, previous to the publication in question on such trial, such person did duly sign and make a declaration that such person had ceased to be a printer, publisher, or proprietor of such newspaper, and did duly deliver the same to the said commissioners or to such officers aforesaid, or unless it shall be proved that previous to such occasion as aforesaid a new declaration of the same or a similar nature respectively, or such as may be required by law, was duly signed and made and delivered as aforesaid, respecting the same newspaper, in which the person sought to be affected on such trial did not join; and the said commissioners, or the proper authorized officer by whom any such declaration shall be kept according to the directions of this act, shall, upon application in writing made to them or him respectively by any person requiring a copy certified according to this act of any such declaration as aforesaid, in order that the same may be produced in any civil or criminal proceeding, deliver such certified copy or cause the same to be delivered to the person applying for the same, upon payment of the sum of 1s. and no more; and in all proceedings and upon all occasions whatsoever, a copy of any such declaration, certified to be a true copy under the hand of one of the said commissioners, or of any officer in whose possession the same shall be, upon proof made that such certificate hath been signed with the handwriting of a person described in or by such certificate as such commissioner or officer,—and whom it shall not be necessary to prove to be a commissioner or officer,—shall be received in evidence against any and every person named in such declaration as a person

*489] was relied on as **conclusive* evidence of proprietorship in the defendants, who were therein described as proprietors, at the time the contract in question was entered into.

*490] *For the defendants, it was insisted that this declaration was not sufficient to charge them in respect of a contract entered into after they had ceased to be proprietors, such contract having been entered into specifically and exclusively with Lowthin.

The jury having found that the contract was made by the plaintiff with Lowthin exclusively, the learned judge directed a verdict to be entered for the defendants, giving the plaintiff leave to move to enter a verdict for *491] the sum claimed, if the court should be of opinion that the **certified* copy of the declaration produced at the trial, was *conclusive* evidence of proprietorship in the defendants, and of Lowthin's having authority to pledge their credit.

Murphy, Serjt., in Michaelmas term last, obtained a rule nisi accordingly.

Talfourd, Serjt., (with whom was *Unthank*,) now showed cause. The defendants are not, by reason of the mere circumstance of their names appearing at the stamp-office as the registered proprietors of the newspaper, liable upon a contract specifically entered with Lowthin, the real proprietor, after they had ceased to have any interest in the concern. They stand, in this respect, precisely in the same situation as part owners of a ship, who, though registered as such, are not liable for repairs ordered by a charterer: *Reeve v. Davis*, 1 Ad. & E. 312. In *Young v. Hunter*, 4 Taunt. 583, GIBBS, J., says: "I am by no means of opinion that there may not be a case where two houses shall be interested in goods from the beginning of the purchase, yet not be both liable to the vendor; as, if the parties agree amongst themselves that one house shall purchase the goods, and let the other into an interest in them, that other being unknown to the vendor; in such a case the vendor could not recover against him, although such other person would have the benefit of the goods." The question always is, who are the contracting parties. Here, the jury have found that the contract was not made with the defendants, or by their authority. There is no pretence, therefore, for charging them.

Byles and *Dowling*, Serjts., in support of the rule. There is no analogy *492] between the 6 & 7 W. 4, c. 76, and **the* registry act relating to vessels. The former makes the declaration filed at the stamp-office *conclusive* evidence of the truth of all such matters set forth therein as are by section 6 required to be set forth. Having filed the declaration, the defendants have thereby precluded themselves from denying making or signing the same as sufficient proof of such declaration, and that the same was duly signed and made according to this act, and of the contents thereof; and every such copy so produced and certified shall have the same effect for the purposes of evidence against any and every such person named therein as aforesaid, to all intents whatsoever, as if the original declaration of which the copy so produced and certified shall purport to be a copy had been produced in evidence, and been proved to have been duly signed and made by the person appearing by and copy to have signed and made the same as aforesaid," &c.

their liability as partners for work done for the newspaper. [MAULE, J. Is not the *prima facie* case against them, arising out of the filing of the declaration, rebutted by the evidence that the contract was made with Lowthin alone, and that he had no authority to pledge the defendants' credit?] The joint proprietorship of the defendants and Lowthin being once established, the case falls within the principle of *Thompson v. Davenport*, 9 B. & C. 78, 4 Mann. & R. 110, (a) and that class of cases. It is the case of one partner pledging the credit of the firm in the ordinary course of trade. [MAULE, J. It is quite clear, that, in the case of an ordinary trading firm, one partner may bind his co-partners; also, that a partner may contract so as to bind himself only, and not his co-partners.] This contract was made by Lowthin within the fair scope of his authority as a part proprietor. The joint operation of the finding of the jury, and of the estoppel created by the statute, binds the defendants.

TINDAL, C. J. The question in this case is, whether the defendants were *contractors*, not whether they were interested as proprietors in the newspaper wherein the articles for which the plaintiff seeks to recover were inserted. Now, the evidence was, that the contract was made by Lowthin upon his own sole responsibility, and not upon that of the defendants. It is true, that, on the register at the stamp-office, they held themselves out as proprietors; and, if it had been shown that the plaintiff was thereby induced to enter into the contract, they might have been liable. But, upon the evidence given, it seems to me that the plaintiff is out of court. [*493]

MAULE, J. I am of the same opinion. The statute 6 & 7 W. 4, c. 76, enacts, s. 6, that,—as a condition precedent to the right to publish a newspaper,—a declaration shall be made and delivered to the commissioners of stamps and taxes, containing, amongst other things, the names of two proprietors resident in the united kingdom: and provides, s. 8, that a certified copy of such declaration shall be admitted in all proceedings, civil and criminal, and upon every occasion whatsoever,—touching any newspaper mentioned in any such declaration, or touching any publication, matter, or thing contained in any such newspaper, as conclusive evidence of the truth of all such matters set forth in such declaration as are thereby required to be set forth, and of their continuance respectively in the same condition down to the time in question,—against every person who shall have signed such declaration. Now, admitting (though it may well be doubted) that this action is a proceeding touching a newspaper, within the meaning of that provision, the declaration only amounts to evidence that they are proprietors. The question, however, to be decided, is, whether they contracted with the plaintiff to do the work in respect of which this action is brought. It appeared that Lowthin, on the 15th of June, 1844, had taken upon himself the sole ownership of the newspaper in question, and that in that capacity he contracted with the plaintiff: and

(a) Set out and commented upon, 2 Smith, L. C. 212.

the jury have found, and, upon the evidence before them, have properly found, that he did so without any authority from the defendants, and that the plaintiff looked to Lowthin alone for his remuneration. Proprietorship, *494] therefore, was immaterial. The fact of the defendants *being proprietors by no means excludes the possibility of that occurring which the jury found did occur.

CRESSWELL, J. I am entirely of the same opinion. The jury found that the contract in fact was not made by the defendants or by their authority. The circumstance of the defendants' names remaining as registered owners does not make the contract theirs, if it was made by the plaintiff exclusively with another party.

ERLE, J., concurred.

Rule discharged. (a)

(a) And see *Patterson v. Gandasequi*, 15 East, 62.

*BEAUMONT v. GREATHEAD. Jan. 14.

A. being sued on a joint and several promissory note made by himself, and by B. and C., pleaded that he paid to the plaintiff, and the plaintiff accepted and received, the moneys in the declaration mentioned, in full satisfaction and discharge of the debt and damages in the declaration mentioned:—*Held*, that the plea was sustained by proof that the amount of the note was paid by C.

Held, also, that the jury were not bound to give nominal damages, though the money was not paid until some time after the maturity of the note. (a)

DEBT for 110*l.* upon a promissory note for 50*l.*, dated the 20th of April, 1842, payable two months after date, with counts for 30*l.* money lent, and 30*l.* upon an account stated. Damages 50*l.*

Plea, that, after the accruing of the causes of action, and every of them; and before, &c., to wit, on, &c., *the defendant paid to the plaintiff*, and the plaintiff accepted and received from the defendant, divers sums of money, amounting to *all the moneys in the declaration mentioned*, in full satisfaction and discharge of the *debt and damages* in the declaration mentioned—verification.

Replication, traversing the acceptance in satisfaction.

*495] The cause was tried before TINDAL, C. J., at the *sittings in London after last Trinity term. The action was brought in the name of Beaumont, as trustee for a loan society, to recover principal and interest alleged to be due upon a joint and several promissory note given to the society by one Green, as principal debtor, and the defendant and one Chittleborough, as sureties.

Green being called in support of the plea, stated, that at various times after the note became due, he had made payments on account thereof, amounting in the whole to 50*l.*, to one Boatman, the secretary of the society.

On the part of the plaintiff it was submitted, that, assuming Green's

(a) As to the latter point, vide post, 499 (a).

statement to be true, it did not support the plea; that, at all events, the plaintiff was entitled to a verdict for the interest accruing after the maturity of the note; and that the payment ought to have been pleaded according to the fact, as a payment made, not by the defendant, but by Green.

It was left to the jury to say whether or not Green really did pay the 50*l.* to Boatman. A verdict was found for the defendant, with leave to the plaintiff to move to enter a verdict for nominal damages, if the court should be of opinion that he was entitled to interest.^(a)

Byles, Serjt., in Michaelmas term last, obtained a rule nisi accordingly.

Dowling, Serjt., now showed cause. With respect to the interest, the jury were at liberty to give it in the shape of damages, or to withhold it, at their pleasure.

The payment by Green was a payment in discharge of the sureties, as well as of his own liability; a payment *by one of several makers of a joint and several promissory note, enuring for the benefit of [496 all and each of them, and being pleadable as a payment by any one of them. In *Whitcombe v. Whiting*, 2 Dougl. 652, the question being whether an *acknowledgment* by one of the makers of a joint and several promissory note was sufficient to take the case out of the statute of limitations as to the others, Lord MANSFIELD said: "Payment by one is payment for all, the one acting virtually *as agent* (b) for the rest; and, in the same manner, an admission by one is an admission by all." So, in *Wyatt v. Hodson*, 8 Bingh. 309, 1 M. & Scott, 442, it was held that *payment* of interest within six years, by one of several makers of a joint and several promissory note, took the case out of the statute as against all, notwithstanding the 9 G. 4, c. 14. The like was held in *Perham v. Raynall*, 2 Bingh. 306, 9 J. B. Moore, 566; *Burleigh v. Stott*, 8 B. & C. 36, 2 M. & R. 93, and *Pease v. Hirst*, 10 B. & C. 122, 5 M. & R. 88, though the party affected by the acknowledgment, or the payment, had signed the note as a surety only. In *Rew v. Pettet*, 1 A. & E. 196, (*Crew v. Petit*, 3 N. & M. 456,) a parish vestry borrowed money upon the promissory notes of the defendants, two churchwardens and an overseer, who added to their signatures the titles of their respective offices. Interest was paid from the parochial funds, and the accounts were allowed by the vestry, in one instance W. (one of the defendants) signing the allowance. The defendants resided constantly in the parish. To an action brought within six years from W.'s signature of the allowance, (but not from the making of the notes,) *the statute of limitations was pleaded: the [497 court sustained a verdict found for the plaintiff. PATTESON, J.,

(a) No question was raised whether a payment of 50*l.* could satisfy an admitted precise demand of 110*l.*, or whether the jury were justified in wholly *negating* the damages (not exceeding 50*l.*) *confessed* by the plea.

(b) It is difficult to discover an act of agency where A., in satisfying his own engagement, indirectly discharges the liability of B.; or where A. charges himself, and indirectly charges B. by admitting that he has not paid, and assuming that B. has not paid that which the law (as in the case cited) presumes one of them has paid.

there says: "The interest is paid all along by the parish; the defendants are resident all along, and might have known of the payments. One of the defendants actually signs the parish accounts. Now, this, though not a recognition, for all, of the joint liability, may be coupled with other facts, as an admission of the right of the parish to pay for him; and, if it be a payment for *him*, it is a payment for *all*." These cases clearly show that this plea is sustained by proof of the payments made by Green.

Byles, Serjt., (with whom was *R. Miller*,) in support of the rule. The plea was not proved. The plaintiff must be entitled to *some* damages beyond the amount of the principal sum for which the note was given, for interest due thereon from the expiration of the two months to the time of payment.(a) [MAULE, J. The question is, whether a man can plead payment of the amount of a debt, in satisfaction of the debt and of the nominal damages due for its detention.] He clearly cannot. A plea of tender of the principal, after the maturity of a note, would be no answer to an action upon the note: *Hume v. Peploe*, 8 East, 168. Here, the plea is pleaded in satisfaction and discharge of the debt *and damages*, and the proof is that the *debt* only has been paid. Further, the payment is improperly pleaded as a payment *by the defendant*. A joint and several promissory note made by three individuals, operates in law as a several promissory note by each of the three co-makers. The cases cited for the purpose of showing that an acknowledgment, or payment, by one of several makers of a joint and several promissory note, enures as an acknowledgment, or a payment, by each and every of them, stand upon *498] a totally different footing. [MAULE, J. In those cases the inquiry was whether or not there had been an acknowledgment or a part-payment *by the defendant* within six years: they are, I think, *fortiori* cases.] It is not always sufficient that a man adopts an act that is done by another for his benefit: it must be an act which was done in his name: *Wilson v. Tumman*, 6 M. & G. 236, 6 Scott, N. R. 894. In the cases cited, the party making the payment or acknowledgment may be the agent of his co-contractors for the purpose of charging them, but not to discharge them. [CRESWELL, J. Suppose all the makers had been sued upon the note, and each had separately pleaded payment by himself, could the plaintiff, upon proof of payment by either, have had a verdict?] In that case, the party who really had paid, would have proved his plea; the others would not. [TINDAL, C. J. I am unable to get over the difficulty of the adoption by the defendant of the act of the party who made the payment.] No answer whatever has been given to the first point.

TINDAL, C. J. The only objection that remains to be considered, is, that the plea was not supported by the evidence. The form of the plea is, that, after the accruing of the causes of action, and every of them, and before the commencement of the suit, the defendant paid to the plaintiff,

(a) Vide *Du Belloix v. Lord Waterpark*, 1 D. & R. 16; *Laing v. Stone*, 2 M. & R. 561.

and the plaintiff then accepted and received of and from the defendant, divers sums of money, amounting to all the moneys in the declaration mentioned, in full satisfaction and discharge of the *debt and damages* in the declaration mentioned. It is in effect pleaded in full satisfaction of the debt and damages. The jury having given the plaintiff no damages for the detention of the debt, the application made to us on his behalf is, that he may enter a verdict for nominal damages. The question therefore is, whether a party who has received the full amount of his actual debt, *may still maintain an action for nominal damages. No authority [*499 has been cited to show that this nominal damage is such an actually existing damage, that it is not covered by payment of the debt. I think there is no foundation for this application. At all events, if the objection is valid, it is upon the record.(a)

MAULE, J. The question for consideration is, whether, where a sum of money is due upon simple contract, and the creditor is entitled to claim nominal damages for its detention, the debtor is discharged by the creditor's acceptance, before action brought, of the amount of the debt, or whether the former may afterwards sue for such nominal damages. I apprehend he cannot. Nominal damages are a mere peg on which to hang costs. If a creditor were to say to his debtor, "You owe me 50*l.* and a nominal sum for the detention thereof;" and the latter were to produce 50*l.* and tender it to the former, saying, "Here is the amount of the debt I owe you, and the nominal damages you claim;" that, I conceive, would be a very good tender. Nominal damages, in fact, mean a sum of money that may be spoken of, but that has no existence in point of quantity: and I think a man may very well pay 50*l.* in satisfaction and discharge of a debt of 50*l.* and of the nominal damages due for its detention. The present plea may, therefore, be taken to have been proved, the jury not being bound to give any interest. The plea is, in effect, a plea of payment of *some* money, and not of an ascertained and definite sum; and consequently the objection will probably not be found to *be upon [*500 the record: if it is, the plaintiff may have the benefit of it elsewhere.

Then, this being a joint and several promissory note, I think a payment made by one of the makers, enured in discharge of the several liability of each, and of the joint liability of all; and, therefore, when the payment was made by Green, it was made, and was accepted by the plaintiff, for each of the other makers of the note, and has been properly pleaded as a payment by the party on whose behalf it was made.

CRESSWELL, J. I am of opinion that the lord chief justice was not bound to tell the jury that they must find *some* damages, and that the jury

(a) The plea is in *confession* of the precise debt demanded, and of *damages to the amount of 50*l.* or some part thereof*. If the term "all the moneys in the declaration mentioned" is applicable to the debt only, to the exclusion of the damages, then the record shows an *insufficient avoidance*; but, if these words point to a payment of the debt demanded, plus a *reducible* sum of 50*l.* claimed as damages, then (rejecting or not rejecting the last two counts) it is merely a case of reception of evidence which does not prove the issue.

were not bound to give interest in the shape of damages. Payment of a smaller sum cannot be pleaded in satisfaction of a debt of larger amount: but I am not aware that the doctrine has ever been extended to the case of a claim for nominal damages after payment of the full amount of the actual debt.(a)

It may be doubtful whether the question is not upon the record. The plea is, that, after the accruing of the causes of action, and every of them, and before the commencement of the suit, the defendant paid to the plaintiff, and the plaintiff then accepted and received of and from the defendant, divers sums of money, amounting to all the moneys in the declaration mentioned, in full satisfaction and discharge of the debt and damages in the declaration mentioned. If that is to be taken to mean a payment only of the *debt* mentioned in the declaration, then the objection is upon the record, and our decision, if erroneous, may be set right.

As to the other point, I concur in the opinion expressed by the rest of the court.

*501] *ERLE, J. I think there is no ground for entering a verdict for the plaintiff. No authority has been cited,—nor am I aware of any,—that supports the position that a payment cannot be pleaded in satisfaction of a debt, unless made at the moment the debt becomes due.

Justice requires that payment by one of several contractors should be considered as payment by each; and it may be so pleaded: the objection to the form of this plea, therefore, is not tenable.

Rule discharged.(b)

(a) It has been held that payment of the *principal* on a respondentia bond, will support a plea of *solvit post diem*; and that, by accepting such principal, the obligee loses his claim for interest, which can be recovered only in the shape of accessory damages. *Dixon v. Parkes*, 1 Esp. N. P. C. 110, S. C. 5 Wentw. Pleadings, 510, 518; and see *Hellier v. Franklin*, 1 Stark. N. P. C. 291.

(b) Vide *Feize v. Thompson*, 1 Taunt. 121; *Baker v. Brown*, 2 M. & W. 199, 5 Dowl. P. C. 313, 2 Gale, Exch. 223.

FIVAZ v. NICHOLLS. Jan. 16.

One of two parties to an agreement to suppress a prosecution for felony, cannot maintain an action against the other, for an injury arising out of the transaction in which they have both been illegally engaged.

A declaration in case stated that B. (the defendant) had charged C. with embezzlement; that it was agreed between B. and A., (the plaintiff,) that B. should abstain from prosecuting C., and that, in consideration thereof, C. should draw, and A. should accept, a bill of exchange, and that C. should endorse the same to the defendant. The declaration then went on to aver that a bill was drawn, accepted, and endorsed to B. pursuant to this corrupt and illegal agreement; that B., well knowing the illegal nature of the transaction, and that A. was not liable at law to pay the amount of the bill, and that there was no reasonable or probable cause for suing him thereon, conspired with D., a pauper, that the bill should be endorsed to D., and that D. should sue A. upon the bill, for the sole benefit of B.; and that an action was accordingly brought by D. against A. in which A. obtained a verdict, on the ground of the illegality of the consideration for the acceptance, but was unable to obtain his costs, in consequence of the insolvency of D.:—

Held, that, inasmuch as A. could not make out his case except through the illegal transaction to which he himself was a party, the action would not lie.

Seemle, that no action will lie against a party for inciting a third person to bring a civil action against the plaintiff without reasonable or probable cause.

CASE. The declaration stated, that, before the drawing and accepting of the bill of exchange thereafter mentioned, to wit, on the 4th of November, *1840, the defendant had accused and charged one J. A. [*502 Leeman, with having committed a certain offence, that is to say, that he, Leeman, being employed as the clerk of the defendant, did, by virtue of his said employment, and whilst he was so employed, receive, and take into his possession, certain moneys to a large amount, to wit, 400*l.*, for and in the name of and on the account of the defendant, his master, and that the said money Leeman did fraudulently and feloniously embezzle, steal, take, and carry away, against the form of the statute in such case made and provided; that the defendant had, on the day and year aforesaid, charged Leeman with the said offences, upon the oath of the defendant, before J. T. Esq., one of the magistrates of the police courts of the metropolis, sitting at the police court in Union Hall, within the metropolitan police district, and Leeman was then in custody of the governor of, and a prisoner in, the county jail at Newington, in the county of Surrey, within the metropolitan police district, for, and charged with, the said offence; that the defendant had, before and at the time of the accepting of the bill of exchange thereafter mentioned, threatened to prosecute, and was about to prosecute, Leeman for the said offence; and thereupon, and before the making and accepting of the said bill therein-after mentioned, to wit, on the 20th of November, 1840, it was, amongst other things, agreed by and between the defendant and the plaintiff, that the defendant should not prosecute, and should desist from all further prosecution of, Leeman for the said offence so charged against him as aforesaid, and should procure Leeman to be discharged from the said custody; and that, in consideration thereof, Leeman should, amongst other considerations, draw, and that the plaintiff should accept, a bill of exchange for the payment to the order of Leeman of the sum of 33*l.* 6*s.* 8*d.*, six months after the date thereof, and that Leeman should endorse the [*503 *same to the defendant: Averment, that, in pursuance of the said agreement, Leeman did, on the 23d of November, 1840, draw his bill of exchange in writing, and directed the same to the plaintiff, and thereby required the plaintiff to pay him or his order 33*l.* 6*s.* 8*d.*, for value received, six months after the date thereof; and the plaintiff then accepted the said bill, as and for the said bill to be so drawn, accepted, and endorsed as aforesaid, and on no other account, and for no other consideration whatsoever; and Leeman did then, in further pursuance of the said corrupt and illegal agreement, endorse the said bill to the defendant, and the defendant then took and received the said bill in pursuance of the said agreement, and on no other account, and for no other consideration what-

soever; and the defendant did then accordingly forbear, and had from thence continually forborne, to prosecute, and had desisted from all further prosecution of, Leeman for the said offence so charged against him as aforesaid; and the defendant then procured Leeman to be, and he was then accordingly, discharged from the said custody: that, after the accepting of the said bill by the plaintiff as aforesaid, and after the discharge of Leeman as aforesaid, and before the endorsement of the bill as thereafter mentioned, to wit, on the day and year aforesaid, the defendant well knew and was acquainted with the fraudulent and illegal nature of the transaction thereinbefore mentioned, and was well aware that the plaintiff was not liable at law to pay the amount of the aforesaid bill of exchange, and that there was no reasonable or probable cause whatsoever for suing him thereon; but the defendant, maliciously and unjustly contriving and intending to harass, oppress, and injure the plaintiff, and to cause and procure him to be unjustly and oppressively sued and harassed in respect thereof, fraudulently and collusively combined and conspired with one *504] George Rouse,—who *then was, and from thence continually had been, a person in poor and embarrassed circumstances, and unable to pay the costs of the action thereafter mentioned,—that, in order to make the defence of the plaintiff to the payment of the said bill more difficult, and to deprive the plaintiff of all effectual remedy for the costs of such defence in case of his success, the said bill should be endorsed by the defendant to Rouse, and that Rouse should, for enforcing payment thereof, sue the plaintiff thereon, as thereafter mentioned, for the sole benefit and advantage of the defendant; and the defendant thereupon, for the purpose, and with the intent, and in pursuance of the combination and conspiracy aforesaid, then and after the bill became due, endorsed it to Rouse, in order that he, Rouse, might sue the plaintiff for the amount thereof in his, Rouse's, name, but for the sole benefit and advantage of the defendant: that Rouse did accordingly, in furtherance of such purpose, intent, and conspiracy as aforesaid, to wit, on the 13th of July, 1840, before the barons of her majesty's court of Exchequer of Pleas at Westminster, in the county of Middlesex, implead the plaintiff by writ of summons in an action on promises, and declared in the said action, and in the declaration therein alleged, as the fact was, that Leeman, on the 23d of November, 1840, made the said bill of exchange in writing, and thereby required the plaintiff in this suit to pay to him, Leeman, or his order, 33*l.* 6*s.* 8*d.*, six months after the date thereof, (which period, he alleged, had expired before the commencement of the said suit,) and that the plaintiff then accepted the said bill, and that Leeman then endorsed the same to the defendant, being the endorsement thereinbefore mentioned, and that the defendant then endorsed the same to Rouse, being the endorsement in that behalf thereinbefore mentioned, of all which he, Rouse, *505] further alleged in his said declaration that the plaintiff in this suit had notice, yet that the now plaintiff *had not paid the amount

of the said bill, to Rouse's damage of 50*l.*, and thereupon he brought suit, &c.; to which declaration the now plaintiff pleaded several pleas, to wit, first, that he did not accept the said bill, and that thereof he put himself upon the country, &c.: and for a further plea in that behalf, the now plaintiff secondly pleaded and averred, that, &c., &c., [setting forth the illegal agreement under which the acceptance was given, and its performance by the parties thereto respectively, and alleging that there was no consideration or value for the endorsement of the bill to Rouse, the plaintiff in the said action:] and, for a further plea in that behalf in the said action, the now plaintiff lastly pleaded and averred the same facts and circumstances thereinbefore mentioned and alleged to have been by him pleaded and averred in the said second plea, save and except, that, instead of the said averment in the said second plea made, that there was no consideration or value for the said endorsement of the said bill to Rouse, the now plaintiff, in his said last plea, pleaded and averred that the said endorsement of the said bill to Rouse was after the same became due and payable, and not before, and that he did not become holder thereof until after the same became due and payable: that Rouse joined issue on the first plea, and as to the two other pleas replied *de injuriâ*: that such proceedings were had in the said court in the said action, that, at the trial before TINDAL, C. J., at the summer assizes for the county of Surrey, in 1841, a verdict was found for the plaintiff on the first issue, and for the defendant (the now plaintiff) on the issue upon *de injuriâ*, so far as related to the last plea, &c., and that the now plaintiff thereupon had judgment for his costs, &c.: that, after the pronouncing of the said judgment, to wit, on the 1st of March, 1842, Rouse did depart, and still was away, from this realm, to wit, in America, and had left no property of any description to *which the now plaintiff could resort for payment of his aforesaid costs: and that he, the now plaintiff, had not been paid the [*506 amount of the said costs so incurred, but the same, and every part thereof, still remained justly due and owing to him. By means of which several premises the now plaintiff had suffered great anxiety and pain of mind, and had been put to great trouble and difficulty in making out and proving his defence to the said action, and had been forced and obliged to lay out and expend, and had laid out and expended, divers large sums of money, in the whole amounting to 200*l.*, in and about the defending himself in the aforesaid action brought by Rouse as aforesaid, the same being greater and heavier costs and expenses than if an action had been brought in the name of the now defendant; and that the now plaintiff had been and was otherwise greatly injured in his circumstances, &c.

To this declaration the defendant demurred specially, assigning, amongst others, the following causes—that, even if the declaration disclosed any cause of action at all, which the defendant denied, the cause of action was not shown with sufficient certainty or precision—that, as the declaration stood, the real cause of complaint, if it could be arrived at at all,

could only be arrived at through inference and deduction—that, inasmuch as the plaintiff admitted himself to have been a party to the agreement for concocting the bill mentioned in the declaration, the plaintiff's consent to its transfer was to be assumed until the contrary appeared, yet it was nowhere stated upon the face of the declaration that the alleged transfer was without the knowledge or against the consent of the plaintiff, and, until the contrary appeared, it must be taken that the alleged transfer was in furtherance of the now plaintiff's original intention, and with his continued concurrence, so as to rebut malice, and the plaintiff should have

*507] at least shown, in express terms, that the alleged transfer of the bill was without his knowledge or against his will—that there was nothing stated in the declaration from which the malicious and unjust intention and contrivance in the declaration mentioned, was to be inferred, that the law could not infer any malicious or unjust intention or contrivance from anything apparent on the face of the declaration, and it was therefore incumbent on the plaintiff to show affirmatively and with more precision wherein consisted such malicious and unjust intention and contrivance—that the alleged illegality in the declaration mentioned should have been shown with more clearness, and by means of more positive averment, for that it was quite consistent with the declaration, that, at the time of the making of the alleged agreement and bill of exchange, the innocence and integrity of Leeman in the premises had been conclusively established; or that he had been pardoned; and that the only pretence for a cause of action, as disclosed on the face of the declaration, lay in the alleged transfer of the bill mentioned in the declaration to a party in embarrassed circumstances, whereas the law recognises no such evil consequences to the plaintiff as those upon which he had founded his action, and repudiates the same.

Joinder in demurrer.

Manning, Serjt., (with whom was *G. Hayes*,) in support of the demurrer. No cause of action can arise out of the transaction disclosed in this declaration. It has repeatedly been held, that a party cannot maintain an action in respect of a transaction directly arising out of an illegal contract to which he himself was a party. The facts set up here are, in effect, the same as those which were set up in answer to Rouse's action upon the

*508] bill. In *Simpson v. Bloss*, 7 Taunt. 246, it was held that the test, whether a demand connected with an illegal transaction is capable of being enforced at law, is, whether the plaintiff requires any aid from the illegal transaction to establish his case. There, the plaintiff laid an illegal wager with B.: the defendant assumed a part in the bet: the plaintiff won: it was expected that B. would pay on a certain day, before which the plaintiff, at the defendant's request, because he was going to a distance, advanced to the defendant his share of the winnings: B. died insolvent before the day, and the bet never was paid. The court held, that, inasmuch as the plaintiff could not establish his case without the aid

of the illegal wager in his proof, he could not recover. "The plaintiff," observes GIBBS, C. J., "says, the payment was on a condition which has failed; but that condition was, that Brograve, who was concerned with the plaintiff and defendant in this illegal transaction, should make good his part by paying the whole bet to the plaintiff; and it is impossible to prove the failure of this condition, without going into the illegal contract, in which all the parties were equally concerned. We think, therefore, that the plaintiff's claim is so mixed with the illegal transaction in which he and the defendant and Brograve were jointly engaged, that it cannot be established without going into proof of that transaction, and therefore cannot be enforced in a court of law." In *Stephens v. Robinson*, 2 C. & J. 209, it was held that a printer who had made a false affidavit that he was sole proprietor of a newspaper, could not sue the real proprietors for printing such paper, or for any matter connected with, or assisting, its circulation: BAYLEY, B., observing that "a civil court will not make itself ancillary to the commission of a crime." There, the plaintiff was seeking to obtain money from one who was *participant in the illegal transaction. So, here, the plaintiff can have no right of action independently of the corrupt contract between himself and the defendant. The case, therefore, falls within the maxim of law, *ex dolo malo non oritur actio*. In *Colburn v. Patmore*, 1 C., M. & R. 73, 4 Tyrwh. 677, (a) it seems to have been considered that the proprietor of a newspaper, convicted and fined for the publication of a libel in the paper, inserted without his knowledge and consent by the editor, cannot recover against the editor the damages sustained by such conviction. Lord LYNKHURST, C. B., there said: "I know of no case in which a person who has committed an act declared by the law to be criminal, has been permitted to recover compensation against a person who has acted jointly (b) with him in the commission of the crime. It is not necessary to give any opinion upon this point; but I may say that I entertain little doubt that a person who is declared by the law to be guilty of a crime, cannot be allowed to recover damages against another who has participated in its commission." No contribution will in general be allowed amongst wrong-doers: *Merryweather v. Nixan*, 8 T. R. 186. (c) That doctrine, however, is subject to this qualification, that it does not apply where the act is not morally wrong. (d) [MAULE, J. Or, rather, where the party is ignorant that he is committing an offence.] (e) In *Shackell v. Rosier*, 2 N. C. 634, 3 Scott, 59, the plaintiff published a libel at the request of the defendant, and on his undertaking to indemnify him

(a) And see 4 Tyrwh. 840.

(b) *Quere* as to the joint character of the act of the editor, and the responsibility of the proprietor.

(c) And see F. N. B. 162, C. D.; *Philips v. Biggs*, Hardr. 164, Bull. N. P. 146; 2 Smith, L. C. 297.

(d) *Betts v. Gibbins*, 2 A. & E. 57, 4 N. & M. 64. And see H. 34 H. 6. fo. 26, pl. 3 *Wilson v. Milner*, 2 Campb. 452.

(e) *Acc. Adamson v. Jarvis*, 4 Bingh. 66, 12 J. B. Moore, 241.

*510] against the consequences of such publication, and defended an action brought against him for the libel at the defendant's request, and on his promise to indemnify him against the costs of such action. It was held that the consideration was illegal, and the promise void. Here, the plaintiff is setting up a corrupt agreement under which he has received a benefit. In *Harman v. Tappenden*, 3 Esp. N. P. C. 278, it was held that no action lies to recover the costs of a proceeding by mandamus to restore a member of a corporate body who had been improperly removed. In *Ward v. Lloyd*, 6 M. & G. 785, 7 Scott, N. R. 499, this court refused to set aside a warrant of attorney given to secure a sum of money, the price of compounding a felony: but that was on the ground that the illegal agreement was not sufficiently brought home to the plaintiff.

Dowling, Serjt., (with whom was *Channell*, Serjt.,) *contrá*. This is not the case of one of several wrong-doers seeking to enforce by action against those who stand *in pari delicto* with him, a right arising out of the wrongful act. The plaintiff charges the defendant with having wrongfully conspired with a pauper to enforce against him a demand which he knew he could not enforce. The gist of the action is the conspiracy to deprive the plaintiff of his remedy for his costs; and this is altogether collateral to, and independent of the alleged illegal contract. *Gregory v. The Duke of Brunswick*, 6 M. & G. 205, 7 Scott, N. R. 972, is an authority to show that an action upon the case will lie for a fraudulent conspiracy to do an act prejudicial to the plaintiff. [MAULE, J. Do you find any authority for an action for a conspiracy to bring a civil action?] In *Skinner v. Gunton*, 1 Wms. Saund. 228 c, 1 Ventr. 12, 18, Sir T. Raym. 176, *511] 2 Keb. 473, 476, 497, an action was held to lie against three persons, for that they, *per conspirationem inter eos habitam*, maliciously procured the plaintiff to be held to bail. In *Fitzherbert's Natura Brevium*, p. 116, B. E. F. H., it is laid down, that, "if men say and affirm unto A. that he hath right unto such land, and procure and cause him to sue an action for the same against B., who is tenant of that land, &c., by which he is, of necessity, compelled to sell other lands or tenements for the defence of his land, &c., now he shall have an action against those who procure or conspire to cause A. to bring his action," &c. "Conspiracy shall be maintainable against those who conspire to bring an assize in the name of the plaintiff against a defendant, and to make one attorney for the plaintiff, in which assize the plaintiff was found villain, &c., now he may bring this writ of conspiracy. And conspiracy shall be maintainable against those who conspire to indict one of trespass, &c., whereof he is acquitted," &c. "If one conspire to cause a false office to be found of my land, which is found by his procurement, &c., I shall have a writ of conspiracy." So, in Com. Dig. *Action upon the case for a conspiracy*, (A), it is said that a writ of conspiracy, or an action upon the case in nature of conspiracy, lies for procuring an action to be brought

against another maliciously.(a) In *Flight v. Leman*, 4 Q. B. 883,(b) a declaration in case alleged that the defendant unlawfully and maliciously did advise, procure, instigate, and stir up T. to commence and prosecute an action on the case against the plaintiff, wherein certain issues were joined, as to which the plaintiff was acquitted: and it was held that no cause of action appeared, the declaration not showing maintenance, (inasmuch as the action appeared not to have been commenced when the *defendant interfered,) and not alleging want of reasonable and probable cause for the action. Here, the declaration does con- [*512
tain the allegation that was wanting there.

Manning, Serjt., in reply. In the case last cited no action would have lain if the allegation had been inserted. In *Scott v. Bye*, 9 J. B. Moore, 649, a writ of false judgment had been brought from the Southwark court of requests to this court; and, after argument, the court held that the writ would not lie, and awarded a procedendo. The defendant afterwards brought an action upon the case against the plaintiff in the court of King's Bench, for maliciously, and without reasonable or probable cause, suing out the writ of false judgment, whereby the former was put to costs: and it was held that the action could not be supported. [MAULE, J. That was not a case of conspiracy: the party of his own head sued out the writ.] Here, no answer has been offered to the argument that the cause of action, if any, can only be made out by setting up the illegal agreement. Besides, in the action brought by Rouse upon the bill, the present plaintiff pleaded a false plea, viz., that he did not accept the bill: he therefore, in part, at least, brought the difficulty upon himself.

TINDAL, C. J. I think that this case may be determined on the short ground that the plaintiff is unable to establish his claim as stated upon the record, without relying upon the illegal agreement originally entered into between himself and the defendant. That is an objection that goes to the very root of the action. Suppose, instead of resisting the action brought against him by Rouse, the plaintiff had paid the money, he could not have recovered it back: had he attempted to do so, he would have been met by the maxim of law, *ex dolo malo non oritur actio*. If he [*513
could not succeed in such an action, I do not see how he can recover damages in a court of law for an injury incidentally resulting from the same state of circumstances, inasmuch as he must put in the very front of his declaration the illegal agreement to which he has been a party. The case of *Simpson v. Bloss* seems to me in effect to decide the present. I therefore think the defendant is entitled to our judgment.

MAULE, J. I am also of the same opinion. The principle has been conceded, that the plaintiff cannot recover, where, in order to maintain his

(a) Citing F. N. B. 116, E., and Sir T. Raym. 176.

(b) And see *Wade v. Simon*, post, 548.

supposed claim, he must set up an illegal agreement to which he himself has been a party. It has been contended, however, that the present case does not fall within that rule, inasmuch as the right of the plaintiff to recover does not depend upon the illegal agreement with the defendant, to which he was a party, but upon the subsequent fraudulent conspiracy between the defendant and Rouse. I think that is not so. It was a necessary part of the plaintiff's case to show that Rouse had no real cause of action against him upon the bill. The absence of the cause of action in Rouse arises out of the illegality of the consideration for which the bill was given. The fraudulent transaction was a necessary part of the plaintiff's case; in fact it is founded upon it; and that enables the defendant to take advantage of the blot by demurring to the declaration, which states that the defendant, well knowing the fraudulent and illegal nature of the transaction thereinbefore mentioned, and being well aware that the plaintiff was not liable at law to pay the amount of the bill, and that there was no reasonable or probable cause whatever for suing him thereon, but maliciously and unjustly intending, &c., fraudulently and collusively combined and conspired with Rouse, a pauper, in order *514] to *deprive the plaintiff of all effectual remedy for the costs of his defence, in case of his success, that the bill should be endorsed to Rouse, for the purpose of enabling Rouse to sue thereon, for the defendant's benefit. If the declaration had simply alleged the conspiracy between the defendant and Rouse to impose upon the plaintiff an insolvent party, when the defendant was the person really interested in the result of the action, possibly it might have been good. But that would only have postponed the plaintiff's difficulty to the next stage; for, as soon as it had been shown by plea that the transaction out of which the plaintiff's right to recover, if any, arose, was illegal, the action would have been answered. I do not think the allegation as to the transaction out of which the bill arose could be struck out; it seems to me to be a material part of the declaration. Where a party in pleading states the same thing generally as well as particularly, and the latter statement discloses some illegality in the transaction, I think the general allegation must be taken to have the same meaning.

I am by no means disposed to hold that an action can be sustained for inciting another to bring an action without reasonable or probable cause. The cases seem to me to show the contrary. But it is not necessary to decide that on the present occasion; for, the case seems to me to fall within the general principle referred to.

CRESSWELL, J. I am of the same opinion. It appears that the plaintiff's cause of action rests entirely upon the illegality of a transaction to which the plaintiff was himself a party. The foundation of the plaintiff's claim is the alleged conspiracy between the defendant and Rouse, that the latter should be put forward as plaintiff in an action upon a bill of exchange given in pursuance of an illegal contract. But for the alleged ille-

gality, Rouse had a good cause of action on the bill: *the illegality of the transaction, therefore, is the foundation of the plaintiff's cause of action. [*515

ERLE, J. I also am of opinion that the present action fails, inasmuch as the illegality of the original transaction is the very foundation of the plaintiff's claim. The original transaction necessarily forms part of the statement upon which the plaintiff's right to complain of the fraudulent conspiracy rests; because, but for such illegality, Rouse had a *prima facie* right to sue the plaintiff upon the bill. But for the illegal agreement disclosed by the declaration, I see nothing unlawful in that which is imputed to the defendant. Judgment for the defendant.

Dowling, Serjt., for the plaintiff, prayed leave to amend.

TINDAL, C. J. We do not think that this is a case in which we ought to interfere. Both parties have been guilty of an infringement of the law.

WOOD v. JAMES KERRY, Executor of SUSAN KERRY, deceased.
Nov. 16.

To a declaration charging the defendant as executor, the latter pleaded that he never was executor of the last will, &c., nor ever administered any of the goods or chattels, &c., as in the declaration alleged, concluding to the country:—*Held*, that the plea was properly concluded.

DEBT, against the defendant, executor of the last will and testament of Susan Kerry, deceased, for the price and value of goods, in the lifetime of the said *Susan Kerry, sold and delivered by the plaintiff to Susan Kerry; and for money found to be due from Susan Kerry to the plaintiff on an account stated between them in the lifetime of Susan Kerry. [*516

Second plea, that the defendant never was executor of the last will and testament of the said Susan Kerry, deceased, nor ever administered any of the goods or chattels which were of the said Susan Kerry, deceased, at the time of her death, as in the declaration alleged; concluding to the country.

Special demurrer, assigning for causes—that the plea introduces new matter, viz., that the defendant never administered any of the goods or chattels which were of the said Susan Kerry, deceased, at the time of her death, and yet does not conclude with a verification, (a)—that it traverses matter neither expressly alleged nor necessarily implied in the declaration; that is to say, that the defendant administered the goods and chattels of the said Susan Kerry, deceased, and that the plea improperly concludes to the country, and is otherwise bad in law.

Joinder in demurrer.

Dowling, Serjt., in support of the demurrer. The plea denies matter

(a) Even if the plea is improperly concluded to the country, as introducing new matter, yet as the new matter was the subject of a negative allegation, the defendant was not bound to offer to verify (i. e. to prove) it. See Co. Litt. 303 a, Com. Dig. tit. *Pleader* (E. 29;) *Bodenham v. Hill*, 7 M. & W. 274.

that is neither alleged nor necessarily implied in the declaration, and therefore ought to have concluded with a verification. [TINDAL, C. J. Does not the term "executor" in the declaration include both one who has been named executor in the will, and one who has rendered himself liable as such by intermeddling with the goods of the deceased?] In *517] Com. Dig. *tit. *Pleader*, (2 D. 7,) it is said, that, "to a plea of *ne unques executor*, the plaintiff may reply that *the plaintiff has administered*." (a) [MAULE, J. Your argument is directly contrary to the decision of the Exchequer Chamber in *Scott v. Wedlake*, 14 Law J., N. S., Q. B. 359. There, the plaintiff declared against the defendant as administratrix with the will annexed of E. W., deceased: the defendant pleaded that "she is not, nor ever hath been administratrix," &c., *modo et forma*, concluding with a verification: and it was held that the plea need not conclude to the country, inasmuch as it merely denied that the defendant ever was administratrix, or liable as such. The ground of the decision there is that the word "executor" in the declaration comprehends an executor *de son tort* as well as an executor by probate. That case is a distinct authority to show that the plea *may* conclude with a verification.] If it *may* conclude with a verification, according to the general principles of pleading, it *must* so conclude. [TINDAL, C. J. The authority you cite from Comyns applies only where the defendant has not put the fact of his being an executor, of either description, in issue by his plea. But here the defendant undertakes to prove, before the jury, that he was not an executor of any sort.] *Primâ facie* the allegation in the declaration means that the defendant is named executor in and by the will of the testatrix: if it includes both descriptions, it is double. (b) [TINDAL, C. J. How is the plaintiff prejudiced by this mode of pleading? MAULE, J. It seems from *Couller's case*, (c) that the defendant could not properly be *518] described otherwise than "he is described here: it was there solved that "the naming the defendant *executor testamenti et ultimæ voluntatis*, &c., doth not prove him lawful executor, for so every executor of his own wrong is named, and there is no other form of writ or count."] A replication that the defendant had so dealt with the effects of the deceased as to become executor *de son tort*, would clearly be bad. [MAULE, J. I think otherwise: it would be narrowing the issue.] Suppose the defendant were to plead a retainer in satisfaction of a debt due to himself, if he were an executor *de son tort*, the plaintiff must reply that fact: *Alexander v. Lane*, Yelv. 137. (d) [TINDAL, C. J. To entitle himself to rely on a retainer, the executor must show that he is lawfully so.] The difficulty is that suggested by PARKE, B., in *Wheatley v. Williams*, 1 M. &

(a) Citing Winch, Ent. 341.

(b) The plaintiff, in effect, says to the defendant,—I charge you, as executor. Whether you are executor *de jure* or *de facto*—by the appointment of the testator, or by your own act—I have no means of ascertaining, and am not bound to make the distinction.

(c) 5 Co. Rep. 30.

(d) See the form of such a replication, Lib. Plac. 156, pl. 98, 1 Mod. Ent. 199.

W. 533, Tyrwh. & Gr. 1047, viz., "that there is here a negative, and no affirmative."

Channell, Serjt., in support of the plea. The plea is not open to any of the objections assigned as causes of demurrer. The plaintiff seeks to charge the defendant in a representative character. Since the new rules of pleading, it is quite clear that the representative character is admitted on the record, unless directly traversed. The plea, therefore, merely professes to traverse the representative character the plaintiff has by his declaration assigned to the defendant. Upon such a declaration as this, the plaintiff will succeed, by proving either that the defendant has lawfully administered, or that he has done acts constituting him an executor *de son tort*. *Coulter's case*, and other authorities, (a) show that this is the proper and only mode of declaring. *Scott v. Wedlake* is an authority for the same position, and also for holding that this plea is properly concluded.

*It is true there are precedents of pleas of this sort concluding with a verification: but it does not therefore follow, that a plea otherwise concluded is bad. In delivering the judgment of the court of error in that case, TINDAL, C. J., says: "In the case of defendants charged as executors, the decisions have so far established that a conclusion to the court is proper, that its propriety cannot now be questioned, even although the reason of the rule could not be discovered; and it was admitted in the argument there is no doubt, that, if that rule be applicable to the case of an administrator, the present plea is properly concluded. The reason, however, probably is, that the conclusion to the court is not open to the objection of not necessarily leading to the same issue as if the conclusion had been to the country; but leaves it open to the plaintiff to show in his replication that the defendant is chargeable as executor in a particular manner; and thus one of the objects of pleading—that of narrowing the question of fact to be tried, would be attained. And this reason for the rule exists in the case of a defendant charged as administrator, if the plaintiff may reply, not by repeating his general allegation, but by showing a particular grant of administration; and that narrows the issue, and brings it to the same form which it would have taken had the grant of the administration, according to the old practice, been stated in the declaration. It was contended in the argument, that the case of a defendant charged as administrator, differed from that of one charged as executor, because the plea of *ne unques executor*, by denying that the defendant was executor of the last will, or ever administered as executor, denies more than is alleged in the declaration, which only charges the defendant as executor of the last will; and the denial of the defendant ever having administered is therefore new matter; and that, for that reason, the *plea properly concluded to the court; whereas the plea in the present case of an administrator does no more than deny the allegation in the declaration. But this distinction does not appear to be well

(a) 1 Wms. Saund. 265 (2).

founded. The declaration against an executor does, indeed, describe him as executor of the last will and testament ; but this is because there is no other form of writ or count ; and every executor in his own right is so named, according to *Coulter's case*. The plea, then, in denying that the defendant is executor of the last will, or administered as executor, does no more than deny that he is executor either by right or by wrong ; it does no more than what the allegation in the declaration, that the defendant is executor of the last will, is to be understood as importing. Probably the addition of a denial that the defendant administered, after denying that he was executor of the last will, may have been introduced in pleading, from an apprehension, that, although the term 'executor of the last will' is to be construed in a declaration as comprehending an executor of his own wrong, it might not be so construed in a plea : but, however, this may be, it is certain that a declaration charging a defendant, as executor of the last will, comprehends an executor who, although not executor of the last will, has become liable by administering as such ; and, consequently, a plea denying the administering as executor, is not introductory of new matter, and is therefore in that respect distinguishable from the plea denying the defendant's character of administrator." That seems to show that the conclusion of such a plea as this with a verification, is an exception to the general rule. If the matter alleged in the plea is impliedly stated in the declaration, it is not new matter ; and therefore a conclusion to the country is proper.

Dowling, Serjt., was heard in reply.

*521] *TINDAL, C. J. The question before us is, whether the conclusion of his plea to the country is wrong : it is not necessary for us on the present occasion to decide whether or not it might have concluded with a verification. (a) It appears to me to be a necessary deduction from the doctrine laid down by the Exchequer Chamber in the recent case of *Scott v. Wedlake*, and which is justified by the authorities there cited, that the plea is no more than a complex answer to all that is charged in the declaration, and may therefore be well concluded to the country. All the authorities, from *Coulter's case*, lay it down that "the proper mode of declaring is against the party as executor, and expound that term as including a rightful executor, and an executor *de son tort*." The plaintiff then says by his declaration : you, the defendant, are an executor by right or by wrong, to which the defendant by his plea says, "I am neither." Therefore, where the plaintiff in his declaration charges the defendant in the character of executor, he, in effect, says that he is an executor properly constituted by probate, or that he has become chargeable in that capacity by intermeddling with the goods of the deceased. And the defendant properly meets that, by pleading that he never was executor, nor ever administered any of the goods or chattels of the deceased. The denial is then given to the extent, and no further, than the charge in the

(a) Vide *supra*, 516 (a).

declaration; and therefore I see no objection to its concluding to the country. Possibly such a plea might also be well concluded to the court. But I do not see that the plaintiff can except to the issue in its present form, seeing that it leaves him at liberty, when before the jury, to show that the defendant filled either the one character or the other, at his option. I therefore think the defendant is entitled to judgment on this demurrer.

*MAULE, J. I am of the same opinion. The declaration charges the defendant, in the common form, as executor of the last will and testament of Susan Kerry. That allegation, *primâ facie*, means that he was named as executor in the will; and it would strike one, at first, as somewhat singular, that such an allegation should be supposed to include any other sort of executor than one appointed by the will. But it has been held for centuries, that such is the proper mode of declaring; the ground being, that there is no other form of writ in the register, than one charging the party as executor generally. The result of the authorities, therefore, is, that the meaning of this allegation is, that the party has taken upon himself to act as executor under the will or in some other way; the general term "executor" in the declaration, comprehending the two species of executors, namely, an executor named and appointed by the will, and also one who has rendered himself liable to be charged as such, by taking upon himself to deal with the goods of the deceased. The allegation is proved by showing the defendant to be clothed with either character; just as a party might be proved to be an administrator, by showing a grant of letters of administration to him by the bishop of one diocese or of another. The plea only denies that the defendant is executor in the sense in which that term is to be understood in the declaration. Instead of alleging that generally, the plea enumerates the two species of executors: still, it is but a simple negation of that which is alleged in the declaration. *Primâ facie*, one would say that such a plea must necessarily conclude to the country. The course of the authorities, however, shows that it may conclude with a verification. That it may conclude to the court, is clearly recognised in *Scott v. Wedlake*. But it is quite a different proposition to say that it must so conclude. The paradox is that such a plea may conclude to the court. That may be accounted for in this way. The objection is taken by the plaintiff; if he can show that by concluding with a verification, no different issue can possibly arise, then the plea should properly conclude to the country. But that does not apply to such a plea as this, because the replication may raise a different issue; showing the species of executorship—stating, in the case of an executor or administrator, a grant of probate or letters of administration by a particular ordinary; or, possibly, in the case of an executor, a replication of administration granted, inasmuch as it may be said, that the difference between the two must be taken by plea in abatement. That,

however, is *obiter* only. (a) The ground upon which a plea may be concluded to the court, is, that it does not follow that the same issue must necessarily arise upon it as that already tendered; and, therefore, it is not to be imputed to the defendant that his object in so concluding it can only be to delay the plaintiff. (b) On principle, as well as upon authority, I think it was competent to the defendant at once to take issue in the manner he has done here; and for these reasons I am of opinion that the plea is good, and the defendant entitled to judgment.

CRESSWELL, J. For the reason so fully given by the lord chief justice and my brother *Maule*, I think the defendant was at liberty, if he chose, to conclude his plea to the country.

ERLE, J., concurred.

Leave to amend on payment of costs, otherwise judgment for the defendant. (c)

(a) *Quere*, whether the court would not, *ex officio*, abate the writ, if the plaintiff alleged all the circumstances necessary to render it abatable.

(b) See the notes to *Hyman v. Gerrard*, 1 Wms. Saund. 103, 3 M. & G. 917, n.; as to the cases in which a special traverse may conclude with a verification.

(c) And see *Bentley v. Goldthorpe*, ante, vol. i. p. 368.

*524]

*SIMMONS v. MILLINGEN. Jan. 17.

The 54th section of the metropolitan-police act (a) imposes a penalty upon any person who shall wilfully and wantonly disturb any inhabitant, by pulling or ringing any door-bell, or knocking at any door, without lawful excuse; and s. 63 empowers any constable belonging to the metropolitan-police district, to take into custody, without warrant, any person who shall, "within view" of such constable, offend against the act.

Section 66 enacts, "that any person found committing any offence punishable either upon indictment or as a misdemeanor upon summary conviction, by virtue of this act, may be taken into custody, without a warrant, by any constable, or may be apprehended by the owner of the property on or with respect to which the offence shall be committed, or by his servant, or any person authorized by him, and may be detained until he can be delivered into the custody of a constable, to be dealt with according to law."

In trespass by A. against B. for false imprisonment, B. justified, on the ground of A. having wilfully and without excuse, *within view of the constable who apprehended her*, annoyed and disturbed the defendant and his family by knocking and ringing at his door:—*Held*, that, to support this plea under sections 54 and 63, it was necessary to prove the offence to have been committed within view of the constable.

And, *held*, that the plea afforded no justification under s. 66, inasmuch as it did not allege that A. was "found committing" the offence at the time of apprehension, or that B. was the owner of the property on or with respect to which the offence was committed.

TRESPASS for assault and false imprisonment.

Pleas—first, not guilty—secondly, as to the assault, *molliter manus imposuit* in defence of his possession of a dwelling-house—thirdly, as to assaulting the plaintiff, and compelling her to go into custody, and imprisoning and detaining her in prison, that the defendant was lawfully possessed of a certain dwelling-house situate within the limits of the metropolitan-police district, to wit, in White Lion Street, in the county of Middlesex, in which the defendant and his family, before and at the several

(a) 2 & 3 Vict. c. 47.

times therein and in the declaration mentioned, inhabited and dwelt; that the defendant being so possessed thereof, and inhabiting the same as aforesaid, the plaintiff just before *the time when, &c., in the declaration first mentioned, entered and came into a certain common highway and thoroughfare called White Lion Street, adjoining to the said dwelling-house of the defendant, and into which the outer door thereof opened; that the plaintiff, being so in the said highway and thoroughfare, and within the limits of the said metropolitan-police district, just before the time when, &c., within the said thoroughfare and limits, wilfully and wantonly disturbed and annoyed the defendant, &c., so being such inhabitant as aforesaid, and then being within his said dwelling-house, by pulling and ringing the door-bell of the said dwelling-house, and by knocking in a loud and unreasonable manner, and repeatedly, at the door of the said dwelling-house, with intent to annoy and disturb the defendant, without any lawful cause whatever, contrary to the statute in such case made and provided, (2 & 3 Vict. c. 47,) and thereby greatly disturbed and annoyed the defendant and his family in the peaceable and quiet occupation of his said dwelling-house, in breach of the peace of our lady the Queen; whereupon the defendant, in order to restore good order and tranquillity in his said dwelling-house, and to prevent the continuance of the said annoyance and disturbance, then and there, within the limits aforesaid, gave charge of the plaintiff to one Robert Croxford, then being a constable of the metropolitan-police force, *who saw and had view of the said offence so committed by the plaintiff as aforesaid,*(a) and then requested the said constable to take the plaintiff into custody, in charge, to the nearest police station-house, in order that she might be secured until she could be taken before a magistrate having jurisdiction over the said offence, to be dealt with according to *law, or might give bail for her appearance, according to the statute in such case made and provided; that the said Robert Croxford, so being such constable as aforesaid, at such request of the defendant did then and there, and within the limits aforesaid, gently lay his hands on the plaintiff, for the cause aforesaid, and then and there take the plaintiff into his custody, and did then compel the plaintiff to go in his custody from the said dwelling-house of the defendant, to the nearest station-house, being within the said metropolitan-police district, and being the prison in the declaration mentioned, and then and there delivered the plaintiff into the custody of one William Coleman, then being a constable of the metropolitan-police force then having charge of the said station-house, in order that the plaintiff might be secured until she could be brought before such magistrate, or should give bail for her appearance before such magistrate, if the said constable in charge of the said station-house should deem it prudent to take bail from the plaintiff; that thereupon the said William Coleman, so being such constable as aforesaid, then received the plaintiff into his custody at

(a) It is not alleged that the offence was committed after the passing of the act.

the said station-house, upon the said charge, and kept and detained her in prison there in the said station-house for a short time, to wit, three hours, upon the said charge, because the police courts of the metropolis were during all that time shut, and because it was then Sunday, so that the plaintiff could not be then taken before such magistrate as aforesaid; that, at the expiration of such short time as aforesaid, the said constable in charge of the station-house, discharged the plaintiff out of custody, and set her at large; and that on that occasion the plaintiff was necessarily imprisoned and detained in prison as in the introductory part of that plea mentioned, as the defendant might lawfully do for the cause aforesaid; *527] which were the same *supposed trespasses in the introductory part of that plea mentioned, and above complained of by the plaintiff, and that all such supposed trespasses were committed within the limits of the said metropolitan-police district, and not elsewhere—verification.

To the second and third pleas the plaintiff replied *de injuriâ*; whereupon issue was joined.

The cause was tried before TINDAL, C. J., at the London sittings after last Trinity term. It appeared that the plaintiff, a female who had been in the employ of the defendant, went to his house on the day mentioned in the declaration, being Sunday, for the purpose of demanding payment for certain work she had done for him; that the plaintiff refusing to pay the whole sum demanded by the plaintiff, she refused to quit the house, whereupon the defendant forcibly expelled her; that the plaintiff, whilst outside, violently knocked at the door, and rang the door-bell; and that the defendant sent for a police constable, and gave her into his custody for creating a disturbance, and caused her to be taken to the police-station, where she was detained for some time. It appearing that the offence was not committed in the presence of the constable, it was insisted, on the part of the plaintiff, that the third plea was unproved: the allegation that the constable “saw and had view of the said offence so committed by the plaintiff,” being a material one, and necessary to be proved, in order to establish a justification under the metropolitan-police act, 2 & 3 Vict. c. 47, ss. 54, (div. 16,) and 63.(a)

*528] *The lord chief justice, being of this opinion, directed the jury accordingly; and they found a verdict for the plaintiff

(a) The 54th section enacts, “that every person shall be liable to a penalty of not more than 40s., who, within the limits of the metropolitan-police district, shall, in any thoroughfare or public place, commit any of the following offences, that is to say,” &c.: and, among the offences enumerated, are the following, (div. 16,) “every person who shall wilfully and wantonly disturb any inhabitant by pulling or ringing any door-bell, or knocking at any door, without lawful excuse, or who shall wilfully and unlawfully extinguish the light of any lamp.”

And the 63d section enacts, “that it shall be lawful for any constable belonging to the metropolitan-police district, and for all persons whom he shall call to his assistance, to take into custody, without a warrant, any person who, *within view of any such constable*, shall offend in any manner against this act, and whose name and residence shall be unknown to such constable, and cannot be ascertained by such constable.”

on the first and third issues, damages 40s., and for the defendant on the second.

C. Jones, Serjt., in Michaelmas term last, pursuant to leave, obtained a rule nisi to enter a verdict for the defendant on the third issue. He relied on the 66th section of the statute above referred to, which enacts, "that any person found committing any offence punishable either upon indictment or as a misdemeanor, upon summary conviction, by virtue of this act, may be taken into custody, without a warrant, by any constable, or may be apprehended by the owner of the property on, or with respect to which the offence shall be committed, or by his servant, or any person authorized by him, and may be detained until he can be delivered into the custody of a constable, to be dealt with according to law."

Byles, Serjt., now showed cause. The third plea is framed upon the 63d section of the metropolitan-police act, and therefore necessarily alleges that the offence was committed *within view of the constable* who apprehended the plaintiff. There was no conflict of evidence. The offence was not committed within view of the constable. The plea, therefore, was not proved. The defendant now seeks to rest his justification upon section 66. To bring the case within that section, however, it is essential to allege, as well as to prove, that the *party was *found committing* an offence punishable by virtue of the act; that is, [529 he must be *seen* to commit the offence by the party who apprehends him; he must be taken *flagrante delicto*. That is not alleged with respect to the defendant himself: as to the constable it is alleged, and the proof has failed. [TINDAL, C. J. I do not see how the defendant can shift his defence from section 54, upon which his plea is evidently founded, to section 66, which seems to me to point to a totally different class of offences. Under the 66th section, the defendant could only justify the detention of the plaintiff until she could be delivered into the custody of a constable; whereas, here, the plea affects to justify the subsequent imprisonment also.]

C. Jones, Serjt., in support of the rule. It is competent to the defendant to support his plea upon any clause of the act that may enable him to do so, notwithstanding it was framed upon the 54th or 63d section. Though it is essential for the justification of the *constable* that the offence should be committed within his view, it is otherwise with respect to the owner of the property. [TINDAL, C. J. Can the party who puts the constable in motion be in a better situation than the constable?] It is submitted that he may. The offence of which the plaintiff was guilty was a misdemeanor at common law. [TINDAL, C. J. The plea states it to have been contrary to the statute, and to the annoyance of the defendant and his family; it has not the aspect of a *public* nuisance.] In order to bring the case within the 66th section, it was not necessary that the plaintiff should be *found* or *seen* committing the offence by the constable; the act expressly providing that the offender may be apprehended "by the

owner of the property on, or with respect to which the offence shall be committed, or by his *servant, or any person authorized by him." The defendant is, therefore, entitled to a verdict on the third issue.

TINDAL, C. J. I am of opinion that the rule ought to be discharged. The question arises on the third plea, which, it is quite clear, was framed with reference to the 54th and 63d sections of the statute 2 & 3 Vict. c. 47. It points distinctly to the offence described in s. 54, div. 16; for, it uses the very words that are found therein when it alleges that the plaintiff "wilfully and wantonly disturbed" the defendant and his family, by pulling and ringing at the door-bell, and knocking at the door of the defendant's house without any lawful excuse. And, when we look at s. 63, we find the authority given to the constable in these words:—"it shall be lawful for any constable belonging to the metropolitan-police district, and for all persons whom he shall call to his assistance, to take into custody, without a warrant, any person who, *within view of any such constable*, shall offend in any manner against this act, and whose name and residence shall be unknown to such constable." The offence must be committed *within view* of the constable; and accordingly the plea goes on to allege, that the constable "saw and had view of the said offence so committed by the plaintiff." That was distinctly disproved at the trial. The plea, therefore, being expressly framed on the two sections I have referred to, and being substantially disproved, the defence that might otherwise have been afforded under it fails. The defendant, however, insists that he may nevertheless rely for his justification on section 66. Perhaps, if the 66th section did apply distinctly to the same offences as those enumerated in the former sections, and the allegations in the plea were sufficient to point it to that section, the argument might *be well
 *531] founded. But I am of opinion that it fails in both respects. The 66th section addresses itself to offences punishable either upon indictment or as misdemeanors upon summary conviction by virtue of that act; and there are various offences that are so punishable mentioned in other sections besides the 54th. It would be somewhat singular, if, after providing specific punishments for certain offences, a subsequent clause should be found making a more general provision for the same description of offences. But I think the 66th section was only intended to apply where the party was *found committing* the offence; and here there is no allegation that the plaintiff was found committing the offence in question, either by the defendant or by the constable. If it be said that the statement in the plea that the constable saw and had view of the offence so committed by the plaintiff, is tantamount to an allegation that he found her committing the offence, the answer is that it was not proved. Besides, I think, that, under s. 66, the plea should contain a further allegation, in which this plea is deficient: that section only applies to an apprehension of the offender by, or by the direction of *the owner* of the property

on, or with respect to which the offence shall be committed; and here there is no averment that the defendant was the *owner* of the house in question. (a) Upon the whole, therefore, I am of opinion that the plea was substantially disproved, and consequently that the third issue was properly found for the plaintiff.

MAULE, J. I also am of opinion that this rule should be discharged. The point upon which the *rule was granted was whether the third issue ought not to have been found for the defendant; in [532 other words, whether the third plea was not proved. The plea is framed upon one or other of three sections of the 2 & 3 Vict. c. 47, namely, the fifty-fourth, the sixty-third, or the sixty-sixth. With respect to the fifty-fourth and sixty-third sections, to sustain an apprehension of a party under them, the offence must be shown to have been committed within view of the constable; and accordingly this plea so alleges. That, however, was disproved by the evidence. The third issue, therefore, was properly found for the plaintiff, so far as those sections are concerned. But it is said that the sixty-sixth section makes the plea good, and that it is supported by the evidence as a plea under that section. I do not think the plea can properly be understood in that sense. The sixty-sixth section applies to offenders taken *flagrante delicto*: it provides, "that any person *found committing* any offence punishable either upon indictment or as a misdemeanor upon summary conviction by virtue of this act, may be taken into custody, without a warrant, by any constable, or may be apprehended by the owner of the property on, or with respect to, which the offence shall be committed, or by his servant, or any person authorized by him, and may be detained until he can be delivered into the custody of a constable, to be dealt with according to law." In order to bring the case within that section, the party must be actually "found committing" an offence: it is not enough to show that he *has committed* the offence, however recently. Suppose the offence to have been of the kind here complained of, that the party had knocked violently and frequently at the defendant's door, and rung his bell, to the disturbance and annoyance of the inmates of the house; if he has ceased to knock and ring, and has walked away, whether a yard or a quarter *of a mile, it matters [533 not, he is not within the words or the policy of this section, which only applies where the offender is actually in the course of committing the offence, and it is necessary to apprehend him, in order to prevent the continuance of the nuisance. Here, the plea does not allege that the plaintiff was found committing the offence with which she is charged; it states that the plaintiff, just before the time when, &c., wilfully and wantonly disturbed and annoyed the defendant and his family, by pulling and ringing the door-bell, and by knocking in a loud and unreasonable manner,

(a) *Quære*, whether a lawful occupier is not an owner within the statute. If the enactment applied only to an *absolute* owner,—a party seized in fee-simple in possession,—its operation would be very limited.

and repeatedly, at the door of his house, with intent to annoy and disturb the defendant, without any lawful cause whatever, contrary to the statute in such case made and provided, and thereby greatly disturbed and annoyed the defendant and his family in the peaceable and quiet occupation of his said house, &c.; whereupon the defendant, in order to restore good order and tranquillity in his said house, and to prevent the continuance of the said annoyance and disturbance, then gave charge of the plaintiff to a constable, *who saw and had view of the said offence so committed by the plaintiff* as aforesaid, and then requested the said constable to take the plaintiff into custody, in charge, to the nearest police station-house, in order that she might be secured until she could be taken before a magistrate having jurisdiction over the said offence, to be dealt with according to law, &c. That is quite consistent with the constable having seen the plaintiff ringing the bell and knocking at the door, not knowing whether she had any justifiable excuse or not, and having taken her into custody after she had gone away to the distance of a mile or more. That would sustain the allegations in this plea, but would not bring the case within the sixty-sixth section. The plea is clearly not a good plea under that *534] section. The *probata* failed as to the fifty-fourth *and sixty-third sections, and the *allegata*, in respect of the sixty-sixth.

CRESSWELL, J. I also think the rule should be discharged. The third plea is clearly not a good plea under the sixty-sixth section: there is no averment that the plaintiff was *found committing* the offence therein charged. Then to entitle a defendant to a verdict upon a bad plea, it must at all events be proved literally: and here the evidence failed to sustain this as a plea under the sixty-third section.

ERLE, J. I also am of opinion that the plaintiff was entitled to a verdict on the third issue. The plea contains all the allegations that were essential to be proved to justify the arrest of the plaintiff under the fifty-fourth and sixty-third sections of the act. The defendant, however, failed to prove that the offence was committed within view of the constable. The defendant now relies on the sixty-sixth section. That section gives a right to a constable, or to the owner of the property in respect of which any offence may be committed, to take into custody, without warrant, any person *found committing* the offence. There is no allegation in this plea that the plaintiff was found committing the offence charged, at the time of her apprehension. And, assuming the allegation that the offence was committed *within view* of the constable, to be equivalent to that, the proof failed, for the policeman did not see the offence committed.

Rule discharged.(a)

(a) See *Grant v. Moser*, 5 M. & G. 123, 6 Scott, N. R. 46.

*HEARNE v. TURNER. Nov. 20.

[*535]

In trover by A. against B. for two promissory notes, B. pleaded, that, before A. was possessed of the notes, one C. was lawfully possessed thereof, as of his own property, that they had been fraudulently obtained from C., and wrongfully delivered to A., whereupon B., as the agent of C., and by his direction and authority, took the notes out of the possession of A. The replication traversed the property in C.

To support the affirmative of this issue, C. was called as a witness. He stated, on the *voir dire*, that he had not indemnified B., and that he had nothing whatever to do with the action:—*Held*, that he was an admissible witness under the 3 & 4 W. 4, c. 42, s. 26, and the 6 & 7 Vict. c. 85.

And *semble*, that he was competent at common law.

TROVER, for two promissory notes.

Plea, *inter alia*, thirdly, that, before the plaintiff was possessed of the notes, one John Mytton was lawfully possessed, as of his own property, of the notes; and that, whilst Mytton was so possessed thereof, to wit, on, &c., certain persons then pretending to carry on business by and under the firm or name of Smith & Co., to wit, one Benjamin Parker and one T. H. Coyle, obtained the notes from Mytton by fraud, covin, and misrepresentation, and afterwards, to wit, on, &c., wrongfully delivered the notes to the plaintiff, and that the plaintiff then had notice of the premises; and that thereupon the defendant, afterwards, to wit, at the time when, &c., for, and as the agent of, Mytton, and by his direction and authority, took the notes,—then being, and still remaining, the property of Mytton, and Mytton then being entitled to the possession thereof,—from and out of the possession of the plaintiff, as he lawfully might do for the cause aforesaid, &c.

To this plea the plaintiff replied, that, at the time when, &c., he was lawfully possessed, as of his own property, of the notes in the declaration mentioned, in manner and form as in the declaration alleged; *without this* that the said promissory notes, or either of them, were or was the property of Mytton, or that Mytton was then entitled to the possession thereof, in manner and form as in the third plea alleged.

*At the trial, before ERLE, J., at the London sittings after last Trinity term, Mytton was called as a witness in support of the defendant's third plea. Being objected to on behalf of the plaintiff, upon the ground that he was directly interested in the event of the suit, seeing that it was his own title that was in issue, he stated, on the *voir dire*, "that he had not indemnified the defendant, nor had any one done so on his behalf; that he supposed he should be exempted from payment of the bills if the defendant succeeded, but he did not know; that he was never consulted about the action; that he did not know where the bills were, or where to get them; and that he had nothing whatever to do with the action." It also appeared that Turner, when taken before a police-magistrate on a charge of feloniously obtaining the notes from Smith & Co., stated, that, in possessing himself of them, he acted as the solicitor and agent of Mytton, whose property they were. [*536]

The learned judge thought the witness, Mytton, was rendered competent by Lord DENMAN's act, 6 & 7 Vict. c. 85, and accordingly admitted his evidence. He proved the substance of the plea.

A verdict having been found for the defendant,

Sir T. Wilde, Serjt., in Michaelmas term last, obtained a rule nisi for a new trial, on the ground, amongst others, that Mytton's evidence had been improperly received.

Shee and *Byles*, Serjts., (with whom was *John Henderson*,) now showed cause. Mytton was a perfectly competent witness, independently of either of the recent statutes. He had no certain and immediate interest in the *537] event of the suit. In *Phillipps on Evidence*, 9th edit. p. 81, it is *said: "The general rule is laid down by GILBERT, C. B., in these words (a)—'The law looks upon a witness as interested, where there is a certain benefit or disadvantage attending the consequence of the cause one way.' (b) And Mr. Justice BULLER, in the case of *The King v. Prosser*, 4 T. R. 20, says—I take the rule to be, that, if the witness can derive no benefit from the cause before the court, he is competent.'" BULLER, J., in a previous case—*Carter v. Pearce*, 1 T. R. 163,—had said that, "in order to show a witness interested, it is necessary to prove that he must derive a certain benefit from the determination of the cause one way or the other." In *Smith v. Blackham*, 1 Salk. 283, the heir of a bankrupt was brought to prove a debt due to him, in an action by the assignee, and it was objected that the surplus of the real estate (which was only to come in aid of the personal estate) being to go to the bankrupt and his heirs, the heir, by swearing as to the personal estate, has this benefit, that he discharges the real estate as to so much. But TREBY, C. J., allowed him to be a witness, saying that the contingency was too remote. In *Smith v. Prager*, 7 T. R. 60, S. C. 2 Esp. N. P. C. 486, in an action for usury, the borrower was held a competent witness to prove the whole case: and Lord KENYON, C. J., said:—"The case of *Bent v. Baker*, 3 T. R. 27, laid down a clear and certain rule, by which I have ever since endeavoured to regulate my opinion in causes coming before me at nisi prius, though probably I may not have decided properly in every instance, when called upon to form an opinion on the sudden. The rule there laid down was, that no objection could be made to the competency of a witness upon the ground of interest, unless he were directly interested in the event of the *538] suit, or could avail himself of the verdict in the cause, so as to give it *in evidence on any future occasion in support of his own interest." In *Collins v. Gwynne*, 9 Bingh. 544, 2 M. & Scott, 640, in an action on a bond executed by the defendant as surety for a collector of assessed taxes, it was held that the collector was a competent witness against his surety. TINDAL, C. J., in delivering the judgment of the court, said: "In all the cases put in argument, the interest of the witness in the event of the suit is *certain, immediate, and necessary*: in this case, a judg-

(a) Or to this effect.

(b) *Gilb. Evid.* 106, 107.

ment against the defendant would not have any certain, immediate, or necessary effect on the interest of Bigg, (the collector;) on the contrary, it may never have any effect at all." Here, Mytton clearly had not any certain or immediate interest in the event of the suit: he had not instructed Turner to defend the action; nor had he indemnified him. Mytton's liability on the notes, if he were ever liable at all, would not be varied by a verdict for the defendant in this action. Assuming, however, that he was not a competent witness at common law, the difficulty in respect of the verdict and judgment is removed by the 3 & 4 W. 4, c. 42, s. 26, which would prevent their being used as evidence for or against him, or any person claiming under him, on a future occasion. Or, if recourse must be had to Lord DENMAN's act,^(a) this case presents the very difficulty that statute *was intended to meet: and it is quite clear that Mytton is not a person "in whose immediate and individual [*539 behalf" this action is defended, so as to bring him within the proviso of that act, which applies only to one immediately and directly identified in point of interest with the nominal defendant.

Sir T. Wilde, (with whom was E. James,) in support of the rule. The defendant pleads that he, as the agent of Mytton, and by his direction and authority, took the notes in question out of the possession of the plaintiff. He defends, therefore, upon the title of Mytton, and calls Mytton to support his plea. [CRESSWELL, J. Mytton is called only to prove that which is traversed—namely, the property.] The replication puts in issue the possession of Turner as Mytton's agent. A mere wrong-doer cannot set up the title of a third person. [CRESSWELL, J. Clearly, the authority of Turner, as agent for Mytton, is not put in issue.] Assuming, then, that the defendant stands upon the right of property in Mytton, if the plaintiff recovers, the defendant *may either deliver up the notes or pay the amount of damages. [MAULE, J. He can only pay the [*540

(a) 6 & 7 Vict. c. 85, the 1st section of which, after reciting that "the inquiry after truth in courts of justice is often obstructed by incapacities created by the present law, and it is desirable that full information as to the facts in issue, both in criminal and civil cases, should be laid before the persons who are appointed to decide upon them, and that such persons should exercise their judgment on the credit of the witnesses adduced, and on the truth of their testimony," enacts, "that no person offered as a witness shall hereafter be excluded by reason of incapacity from crime or interest from giving evidence, either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question or on any inquiry arising in any suit, action, or proceeding, civil or criminal, in any court, or before any judge, jury, sheriff, coroner, magistrate, officer, or person having, by law, or by consent of parties, authority to hear, receive, and examine evidence; but that every person so offered may and shall be admitted to give evidence on oath, or solemn affirmation in those cases wherein affirmation is by law receivable, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question, or inquiry, or of the suit, action, or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence: Provided, that this act shall not render competent any party to any suit, action, or proceeding individually named in the record, or any lessor of the plaintiff, or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognisance, or any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part, or the husband or wife of such persons respectively," &c.

amount of damages.] A judgment in trover vests the property in respect of which the action is brought, in the party against whom the verdict is obtained.(a) [MAULE, J. As between the parties to the record.] And those claiming under them.(b) Here the witness had a clear interest in preventing the plaintiff from recovering in this action. The rule is not so stringent as has been contended: it is not essential that the benefit to the witness be *certain*; it is enough if he *may* derive advantage in a given event. In *The King v. Williams*, 9 B. & C. 549, it was held, that, where justices are empowered to give restitution of the possession of lands entered upon by force, or holden by force, the tenant whose land has been entered upon or withholden by force, is not a competent witness: and BAYLEY, J., said: "The general rule, in criminal as well as civil cases, is; that a person *interested in the event*, is not competent." Mytton stands much in the same situation as did the witness in *Bell v. Smith*, 5 B. & C. 188, a party interested in the policy upon which the action was brought. [TINDAL, C. J. *Ward v. Wilkinson*, 4 B. & Ald. 410, seems to come very near the present case. There, in trover by A. against B., C. was held a competent witness to prove property in himself. Suppose the plaintiff fails in this action, and Turner keeps the notes, the record in this action will not enable Mytton to recover them.] He could prove that Turner obtained the notes at the police office, and stated that he would hold them on behalf of his client. He would not warrant the verdict. *541] [TINDAL, C. J. In all the cases, the question has been whether the *verdict and judgment in the particular case would be evidence for or against the witness on a future occasion. If it would not, his evidence is unexceptionable.] Here, if the defendant obtains a verdict upon the strength of Mytton's title, he will have no answer to an action at the suit of Mytton for these notes; for, it is a clear general principle, that a party who professes to act as agent for another, and, as such, acquires property, is estopped from disputing the title of his principal. There are many cases to that effect. [MAULE, J., referred to *Blakemore v. The Glamorganshire Canal Company*, 2 C., M. & R. 133, 5 Tyrwh. 603, 1 Gale, Exch. 78, where, in an action brought by A. and B. for diverting water from their works, it appeared that A., when in the sole possession of the same works, had brought an action for a similar injury, against the same defendants, in which he had obtained a verdict and recovered judgment against them; and it was held that the circumstance of B.'s having been examined as a witness in the former action, when he was disinterested, did not render such verdict and judgment inadmissible.] There, the witness was not interested at the time his testimony was given. This question was much discussed in *Doe d. Teynham v. Tyler*, 6 Bingh. 390, 4 M. & P. 29, where TINDAL, C. J., in delivering the judgment of the court, says.

(a) Vide 6 M. & G. 640, n.

(b) As against strangers, the property does not, even after judgment, vest in the defendant with relation to the conversion: *quære*, whether it does not vest absolutely upon the judgment.

“The general rule upon which the incompetency of witnesses is founded, is laid down by Lord Chief Baron GILBERT, in his *Law of Evidence*, 4th edit. p. 106, in these terms: ‘The law looks upon a witness as interested, when there is a certain benefit or disadvantage to the witness attending the consequences of the cause one way.’ Now, this benefit may arise to the witness in two cases—first, where he has a direct and immediate benefit from the event of the suit itself; and, secondly, where he may avail himself *of the benefit of the verdict in support of his claim in a future action; and, where the case falls within the first description, in which the interest is more immediate and direct, there is no occasion to have recourse to the second principle, where the interest is one degree removed.” Here, the witness was manifestly interested in producing a result that would enable the defendant, his agent, to keep possession of the notes. [CRESSWELL, J. The record in this action would not be evidence for him either way.] He would not need the record to enable him to recover them from Turner; a verdict for Turner to a certainty would prevent him from disputing Mytton’s title; whereas, supposing a verdict to pass for the plaintiff, Turner might set up Hearne’s title to the notes, and that he had paid him the amount of his claim thereon; for, Turner would then be in the situation of the warehouseman in the case of *Ogle v. Atkinson*, 5 Taunt. 759, 1 Marsh. 323. Mytton, therefore, clearly is not a good witness, unless his competency is restored by one of the two statutes referred to. The statute 3 & 4 W. 4, c. 42, is out of the question. In the case of an action by Turner against Mytton upon the notes, or by Mytton against Turner to recover possession of them, it would be enough for Mytton to show Turner’s admission at the police-office that he took possession of them as Mytton’s agent. The case is clearly within the exceptive proviso of the 6 & 7 Vict. c. 85, s. 1. Turner defends upon the title of Mytton. The words of the act are not confined to some positive engagement or legal obligation undertaken by the party; it is enough if the defence is, in truth, made for the benefit of the witness. The fact of Turner having procured the notes as Mytton’s attorney, places him, distinctly and beyond all question, in the situation of a person defending the action on the immediate and individual *behalf* of Mytton.

*TINDAL, C. J. It appears to me that the objection that has been urged to the admissibility of Mytton’s evidence, in point of law, falls to the ground; for, without any reference to the 6 & 7 Vict. c. 85, but upon the law as it stood before, I think Mytton’s evidence was clearly admissible. This is an action of trover brought by Hearne against Turner to recover damages for the conversion of two promissory notes. The answer substantially set up by Turner is, that these notes were the property of Mytton, and were wrongfully in the possession of Hearne, and that he, Turner, for and as the agent of Mytton, took them out of Hearne’s possession. The replication is, that the notes were the property of Hearne, and not of Mytton. So that, upon the issue, the sole question was,

whether the promissory notes were really the property of Hearne or the property of Mytton. Now, the only ground upon which, before the statutes, an objection could have been taken to the admissibility of a witness by reason of interest, was, either that he was immediately interested in the event of the suit, or that the verdict might be available for himself in a subsequent action. Let us see, in the first place, how far Mytton could have any immediate interest in the event of this suit between Hearne and Turner. The phrase "immediate interest" is one the meaning of which is now well ascertained. For example, in ejectment, where the landlord is let in to defend, he is not at liberty to call the tenant; for, the event of the suit one way would remove him from the possession; therefore, he has an immediate interest in the event. So, if a party has deposited a sum of money in the hands of a third person, to abide the event of the suit, his interest is immediate, and his testimony inadmissible. The cases of bail, and of wagers upon the event of a suit, are also instances to exemplify the rule; and this is the extent to which it has been carried. Then, *544] could Mytton derive any benefit from the verdict? All that can be said is, that he might be better off, if a verdict was found for the defendant; not that his legal rights would be at all varied by such a result; for, if Hearne were to recover in this action against Turner, such recovery would not prevent Mytton from asserting any legal right he might have to recover the notes from Hearne; and, on the other hand, if Turner succeeds in this action, Mytton can only recover the notes from him by action: and, if it be said that Turner has estopped himself from denying Mytton's title, by the evidence he has given, that the notes came to his possession as the agent of Mytton, that only proves that Mytton would be entitled to recover them as against Turner, without any reference to the event of this suit. That ground of objection failing, the next question is whether the verdict and judgment in this suit would be evidence for or against Mytton upon another occasion. I do not understand that point to have been much pressed; and it is clearly untenable. Mytton is neither party nor privy to the suit; and, if it were necessary to refer to it, the statute 3 & 4 W. 4, c. 42, ss. 26, 27, removes the objection, by providing that the verdict and judgment shall not be admissible in evidence for or against the witness or any one claiming under him.

MAULE, J. The question of admissibility or non-admissibility of a witness, is often one of considerable nicety and difficulty. The object of Lord Denman's act was, partly to remove objections, and partly to obviate those doubts and difficulties. I am not very willing to enter into the discussion as to the admissibility of this particular witness at common law. I think he was admissible. To render him inadmissible at common law, the witness must be so circumstanced that the record might be evidence *545] for or against him on another occasion, *(and this ground is removed by the statute 3 & 4 W. 4, c. 42,) or he must have a direct and immediate interest in the event of the suit. Here, Mytton stands

thus : whether the plaintiff Hearue, or the defendant Turner, or any one else, sues him on the notes in question, he will be liable, notwithstanding the verdict in the present case, provided the party so suing can show circumstances entitling him to recover. There is a case of *Grylls v. Davies*, 2 B. & Ad. 514, which has not been adverted to at the bar, but which seems to me to be material. There, the servant of a party who had been bargaining for the purchase of a chattel, came to the owner, and said that his master desired to look at it, and would keep it if approved : the chattel was in consequence delivered to the servant, but was neither purchased nor returned. An action of trover was brought against the servant, who called his master as a witness : and the court held, upon a motion for a new trial on the ground of the improper reception of his evidence, that the witness was admissible. Therefore I think there are strong grounds for being of opinion that the witness Mytton was admissible at common law. But I will not further discuss that question. It is properly conceded that the statute 6 & 7 Vict. c. 85, is an answer to the objection, unless Mytton comes within this description of a party on whose immediate behalf the action was defended. So far as regards his defence to this action, the defendant Turner would have been in precisely the same situation if Mytton had been dead : the record, therefore, does not show that Mytton was a person on whose immediate behalf the action was defended. It might, however, have been shown on the evidence. If on the *voir dire* Mytton had said, “I directed Turner to obtain possession of the notes for me, and agreed to indemnify him *against the consequences of any action that might be brought against him for so doing,” then he would [546 have been the person on whose immediate behalf the action was defended. It appeared, however, that Mytton had nothing whatever to do with the defence. He is therefore clearly not within the exception in the late statute ; and, if so, it is conceded, and indeed it could not be denied, that, assuming him to have been incompetent at common law, he would be rendered competent by that act.

CRESSWELL, J. I am of the same opinion. Without meaning to express the slightest doubt as to the propriety of the opinion expressed by my lord and by my brother MAULE, that Mytton was an admissible witness at common law, or at all events rendered so, by the 3 & 4 W. 4, c. 42, ss. 26, 27, I think it sufficient to say that Lord Denman’s act entirely removes all pretence for the rejection of his evidence. *Bell v. Smith* is a totally different case. There, the policy was effected in the names of the plaintiffs, as agents for A., B., C., and D., and for their sole use and benefit. A., being called as a witness for the plaintiffs, was objected to, and thereupon they gave in evidence a deed-poll, executed by A. before the commencement of the action, whereby he released to the plaintiffs all actions which he might have by reason of the policy, or for any moneys to be recovered by them from the underwriters : they also gave in evidence an indenture, executed by A. after the commencement of the action, whereby—after

reciting that the plaintiffs had effected the policy, that A., B., C., and D. were the persons interested, that actions had been commenced in the names of the plaintiffs, and that, they being desirous of an indemnity against the costs, the court of Common Pleas had ordered A., B., C., and D. to indemnify, and that L. and R. had agreed to do it—A., B., C., and D., in consideration thereof, and of 10s., assigned to L. and R. all their interest in the policy, and all benefit to be derived therefrom, and all moneys to be recovered in the said actions, to and for their own exclusive use and benefit. And the court held that A. was, at all events, still liable to the attorney employed to bring the action, and therefore incompetent. That is the whole effect of that case. The observations of my brother MAULE upon this point appear to me to be unanswerable. Mytton is not shown to be the person on whose immediate behalf this action is defended.

ERLE, J. I also am of opinion that this rule should be discharged. It appears to me that Mytton was a competent witness, and, as far as I can discover, competent at common law. If this action had been brought for an ordinary chattel, it is quite clear that the witness would have been competent; and I do not conceive that the case is at all varied by the circumstance of the subject-matter of the action being negotiable securities. At all events, it appearing on the *voir dire* that the action was not defended on the immediate behalf of Mytton, he was, if otherwise incompetent, rendered competent by the 6 & 7 Vict. c. 85.

Rule discharged.

*548]

*WADE v. SIMEON. Jan. 21.

In *assumpsit*, the declaration stated that the plaintiff had brought an action against the defendant in the Exchequer, to recover certain moneys, that the defendant had pleaded various pleas, on which issues in fact had been joined, which were about to be tried, and that, in consideration that the plaintiff would forbear proceeding in that action until a certain day, the plaintiff promised on that day to pay the amount, but that he made default, &c.

Plea, that the plaintiff never had any cause of action against the defendant in respect of the subject-matter of the action in the Exchequer, which he, the plaintiff, at the time of the commencement of the said action, and thence until and at the time of the making of the promise, well knew:—

Held, sufficient, on general demurrer.

Whether it would have been a good plea, if specially demurred to for not distinctly averring that the plaintiff must have failed in the former action, or on the ground that it amounted to non *assumpsit*—*quære*.

A further plea set forth a judge's order for staying the proceedings in the action in the Exchequer, on payment of the money on the day appointed, and that, in default of payment, the plaintiff should be at liberty to sign judgment and issue execution for debt and costs; and averred that the promise declared on was a promise deduced and implied from the obtaining and making that order, and that the order had been subsequently set aside by a rule of the court of Exchequer:—*Held*, bad, on special demurrer, as amounting to non *assumpsit*.

ASSUMPSIT. The first count of the declaration stated, that, before and at the time of the making of the promise thereafter next mentioned, an

action on promises had been commenced and prosecuted by, and at the suit of the plaintiff against the defendant, in the court of Exchequer, that the plaintiff had declared in the said action against the defendant for the non-performance by the defendant of certain promises in the declaration alleged to have been made by the defendant to the plaintiff for the payment by the defendant to the plaintiff, of two sums, one amounting to 1300*l.*, and the other amounting to 700*l.*, and the said action was so commenced and prosecuted, and the defendant declared therein as aforesaid, for the recovery of these sums and the damages by him sustained by the non-performance by the defendant of his promises in respect of the same, parcel of such damages, being interest upon the said sum of 1300*l.* from the 25th of May, 1840, until payment of *the said [549 sum of 1300*l.*, and other parcel of such damages being interest upon the said sum of 700*l.* from the 4th of July, 1840, until payment of the said sum of 700*l.*; that, before and at the time of the making of the promise of the defendant thereafter mentioned, the defendant had pleaded divers pleas to the said declaration, and divers issues had been, and were joined between the plaintiff and the defendant in the said action, and the plaintiff had given due notice for the trial of the same, and the same were about to be tried at, &c., and the plaintiff had, according to the course and practice of the said court, duly entered the nisi prius record in the said action for the said trial, and the said trial was duly appointed and fixed to take place on the 7th of December, 1844, and the same would have taken place had it not been for the promise of the defendant as thereafter mentioned; that, before and at the time of the making of the promise of the defendant as thereafter mentioned, the plaintiff had been put to, and incurred divers costs and charges amounting, to wit, to 300*l.*, in and about the said action; that, before and at the time of the making of the defendant's promise thereafter mentioned, the defendant had, to wit, on the 3d of December, 1844, caused the plaintiff to be served with a notice that the defendant would apply to and move her majesty's high court of Chancery, for an injunction by that court to restrain the plaintiff from issuing execution in the said action on any judgment obtained by him, in case the plaintiff should obtain such judgment; that thereupon, to wit, on the 6th of December, 1844, being the day next before the day when the said trial was so appointed and fixed to take place as aforesaid, in consideration that the plaintiff would forbear prosecuting and would stay all proceedings in the said action until and upon the 14th of December, 1844, save and except the taxation of the said costs and charges, and the obtaining and drawing up of an order therein as thereafter mentioned, he the defendant *promised the [550 plaintiff that he the defendant would on that day pay him the said sums of 1300*l.* and 700*l.*, and interest thereon respectively as aforesaid, together with the said costs and charges, to be taxed, and that, in the event of the defendant's not paying the same, the defendant would

suffer, and the plaintiff should be at liberty to sign judgment in the said action, and that a judge's order should and might be obtained and drawn up in the said action, to secure such payment, and that the said notice and the said application to, and motion in the said court of Chancery, should be abandoned : Averment, that the plaintiff, confiding in the said promise of the defendant, then, to wit, on the 6th of December, 1844, withdrew the said record, and forbore prosecuting, and stayed all further proceedings in the said action until and upon the said 14th of December, 1844, save and except the taxation of the said costs and charges, and the obtaining and drawing up of the said order to be so obtained and drawn up as aforesaid, and, save and except as aforesaid, the plaintiff had from thence continually forbore to prosecute, and had stayed all further proceedings in the said action ; that, after the making of the said promise, and before the said 14th of December, 1844, to wit, on the 11th of December, 1844, the costs and charges of the plaintiff which he had been put to and incurred in and about the said action, and which the defendant promised to pay as aforesaid, were duly taxed at 81*l.* 1*s.* 10*d.*, whereof the defendant then had notice ; and that, although the said 14th of December, 1844, had elapsed before the commencement of the suit, and although the said interest so promised to be paid as aforesaid on the said 14th of December, 1844, amounted to a large sum, to wit, 451*l.* 13*s.* 3*d.*, yet the defendant, although often requested by the plaintiff so to do, had not as yet paid the plaintiff the said sum of 1300*l.*, and 700*l.*, and the *551] said interest amounting to 451*l.* 13*s.* 3*d.*, and the said *costs and charges amounting to, and so taxed at 81*l.* 13*s.* 10*d.* as aforesaid, or either of them, or any part thereof, and the same remained wholly due and unpaid to the plaintiff ; that the defendant did not nor would suffer or permit the plaintiff to sign, and afterwards, and after the said 14th of December, 1844, to wit, on, &c., and from thenceforward wholly hindered and prevented the plaintiff from signing judgment in the said action ; that the defendant afterwards, to wit, on the 27th of January, 1845, obtained a rule and order of the said court for setting aside a certain order before then, to wit, on the 6th of December, 1844, made by ALDERSON, B., and drawn up in pursuance of the said promise, and according to the same ; and that by means of the premises the plaintiff had been delayed in, and hindered and prevented from recovering the said sums and moneys so promised by the defendant to be paid as aforesaid.

There was also a count upon an account stated.

Fourth plea,—to the first count,—that the plaintiff never had any cause of action against the defendant in respect of the subject-matter of the action in the court of Exchequer in that count mentioned ; which he, the plaintiff, at the time of the commencement of the action, and thence until and at the time of the making of the promise in the said first count mentioned, well knew—verification.

Seventh plea,—to both counts,—that the action in the first count mentioned was brought in respect of two checks, one for 1300*l.*, and the other for 700*l.*, and that, after the *nisi prius* record in that count mentioned had been entered, to wit, on, &c., the defendant, with the consent of the plaintiff, obtained an order in the said cause in that count mentioned, to be, and the same was, made by ALDERSON, B., which order was, and is as follows, that is to say: “*Wade v. Simeon*. Upon hearing the attorneys or agents on both sides, and by consent, I do *order, that, upon [552 payment of 2000*l.*, and interest on the two checks, from the date thereof until payment, the debt due from the defendant to the plaintiff for which this action is brought, together with costs, to be taxed and paid on or before the 14th of December instant, all further proceedings in the cause be stayed; and I further order, that, in case default be made in payment as aforesaid, the plaintiff shall be at liberty to sign final judgment, and issue execution for the whole amount remaining unpaid at the time of such default, with costs of judgment and execution, sheriff’s poundage, officers’ fees, and all other incidental expenses, whether *t. fi. fa. or ca. sa.* Dated,” &c.: that the promise in the said first count mentioned—that the defendant would, on the said 14th of December, pay to the plaintiff the said sums of 1300*l.* and 700*l.* and interest thereon respectively as aforesaid, together with the said costs and charges, to be taxed, and that, in the event of the defendant’s not paying the same, the defendant would suffer, and the plaintiff should be at liberty to sign judgment in the said action,—was a promise deduced and implied from the obtaining and the making of the said order as aforesaid, and was thereby, and in no other way made to the plaintiff as in the said count alleged: that the promise in the second count mentioned was a promise deduced and implied from the obtaining and making of the said order therein before mentioned, and from the ascertaining, by taxation, of the amount of the costs to be paid pursuant to the said order, and was thereby, and in no other way made to the plaintiff as in the said second count alleged: that, after the making of the said order, and before the time thereby appointed for payment, to wit, on the 13th of December, the defendant obtained from PARKE, B., a summons in the said cause, which summons was and is as follows, that is to say, &c., [setting out a summons, returnable on the following day, *calling on the plaintiff to show cause [553 why the order of ALDERSON, B., should not be set aside, upon payment into court of the principal and interest for which the action was brought, and the defendant let in to try, upon terms, and why the proceeding should not in the mean time be stayed, or why all further proceedings should not be stayed until the 5th day of the then next term,]—a copy of which summons was, on the day last-mentioned, duly served, according to the practice of the said court, upon the plaintiff: that, after the service of the said summons, and before default had been made in payment according to the terms of the said order of ALDERSON, B., to wit,

on the 14th of December, it was agreed between the plaintiff and the defendant that PARKE, B., should make, and he did then, to wit, on the day last aforesaid, make, by consent of the plaintiff and the defendant, an order in the said cause [adjourning the summons of the 13th of December to the 17th]—a copy of which last-mentioned order was, before any default had been made in payment as aforesaid, to wit, on, &c., duly served on the plaintiff, according to the practice of the said court: that afterwards, to wit, on the 17th of December, the subject-matter of the last-mentioned summons was heard at chambers by ROLFE, B., and thereupon afterwards, to wit, on the 18th of December, ROLFE, B., did make an order in the said cause as follows, that is to say:—“*Wade v. Simeon*. Upon hearing counsel on both sides, and upon reading the several affidavits, &c., I do order, that, upon the defendant’s undertaking to pay to the plaintiff interest on the sum of 2400*l.* from the 14th instant, at 5*l.* per cent., if the plaintiff shall eventually become entitled to that sum, and provided the defendant pays into court 2500*l.* on or before the 23d instant, all further proceedings in this cause shall be stayed till the fourth day of next term. I further order, that, if such money is not so paid, the *554] summons *dated the 13th of December instant, be dismissed with costs, to be taxed by the master, and paid by the defendant to the plaintiff, his attorney or agent. Dated, &c.”—a copy of which last-mentioned order was, on the day last aforesaid, served on the plaintiff according to the practice of the said court, and the defendant, on the same day, did undertake to pay interest to the plaintiff according to the said order; of which several premises the plaintiff on the day aforesaid had notice: that, on the 21st of December, the defendant did duly pay into the said court 2500*l.*, according to the last-mentioned order: that, afterwards, to wit, on the fourth day of the term next following the last-mentioned order, to wit, on, &c., the said court of Exchequer made a rule in the said cause, which rule was and is as follows, that is to say [setting out a rule calling upon the plaintiff to show cause why the order of ALDERSON, B., of the 6th of December, should not be set aside, upon such terms as the court should direct]—a copy of which rule afterwards, to wit, on the day last aforesaid, was duly served on the plaintiff; which rule was returned to show cause before the commencement of this suit: that afterwards, to wit, on the 27th of January, 1845, to wit, before the commencement of this suit, the said rule came on to be heard before the said court of Exchequer, &c., whereupon the said court made a rule—being the rule in the said count mentioned—that the order of ALDERSON, B., made in this cause on the 6th of December then last, should be set aside; that the plaintiff should proceed to the trial of this cause, and, in the event of his obtaining a verdict, that he should be at liberty to enter up judgment thereon as of the time he would have been entitled to enter up the same under the said order, had not the same been thereby set aside; that the money paid into court by the defendant, on the 21st of December, 1844,

should remain therein to abide the event *of the trial; that, in case the plaintiff should ultimately be entitled to recover and receive the same, he should be entitled to charge the defendant with interest at 5 *per cent.* from the time it was so paid in; and that the defendant should pay to the plaintiff the costs of that rule, and of the said order, and of, and incidental to, restoring the cause to the position in which it stood at the time of the date thereof—a copy of which rule was, to wit, on the day last aforesaid, duly served on the plaintiff according to the practice of the said court: that the costs provided by the last-mentioned rule to be paid by the defendant to the plaintiff were afterwards, to wit, on the day last aforesaid, taxed by one of the masters at 6*l.* 12*s.* 6*d.*, and were afterwards, to wit, on the day last aforesaid, paid by the defendant to, and received by the plaintiff: that the said cause was still depending in the said court; and that the plaintiff, of his own default, had never proceeded to the trial thereof pursuant to the terms of the last-mentioned rule—verification.

Special demurrer to the fourth plea, assigning for causes, that it does not confess and avoid, or traverse, or deny, any of the matters in the first count alleged; that the matter pleaded affords no defence to the cause of action in that count mentioned; that the plea sets up as a defence immaterial matter; that the plea does not allege or show that the defendant, before or at the time of the making of the promise, was not aware that the plaintiff had no cause for the said action, nor does it allege or show that the plaintiff concealed any thing from the defendant; that it is ambiguous and uncertain what is meant by the allegation in the plea that the plaintiff never had any cause of action against the defendant in respect of the subject-matter of the said action; that the plea does not exclude all other consideration for the promise in the said count mentioned; *that it is ambiguous, and uncertain from the plea, what is the real defence the defendant intends setting up thereby; and that the plea should have concluded to the country. [*556]

Special demurrer to the seventh plea, assigning for causes, that it does not confess and avoid, or traverse, or deny, the promises in the declaration mentioned; that the plea is insufficient, as being an argumentative traverse and denial of the defendant's having made the promises mentioned in the declaration; that it is insufficient as amounting to a plea of non assumpsit to the first count; that it is insufficient as amounting to a plea of non assumpsit to the last count; that the plea should have concluded to the country; that the plea professes to answer the whole of the promise in the first count, but only answers part of such promise; that it is not possible that such promises as those in the declaration alleged could be deduced and implied from the facts in the plea alleged; that the plea is bad for duplicity, in first denying the promises to have been made as alleged in the declaration, and afterwards stating that they were rescinded; that it is ambiguous, and uncertain, from the introductory part of the

plea, whether the same is pleaded to the whole of the declaration, or only to the first count; that, if the same be taken as pleaded to the first count, the same is insufficient as attempting afterwards to answer the cause of action in the last count mentioned; that it is insufficient as showing that the court of Exchequer, without any power, authority, or jurisdiction whatsoever, and without any consent on the plaintiff's part, revoked and rescinded the promises in the declaration mentioned; and that, though it may confess the promises to have been made, it does not show any thing to avoid, discharge, release, or satisfy the causes of action in the declaration mentioned.

The defendant joined in demurrer.

*557] **Channell*, Serjt., in support of the demurrers. The promise alleged in the declaration consists of four parts—first, that the defendant would pay to the plaintiff 1300*l.* and 700*l.*, with interest and costs, on the 14th of December, 1844—secondly, that, in the event of his not paying the same, he would suffer judgment—thirdly, that a judge's order should be obtained by consent—fourthly, that the motion in Chancery, of which notice had been given, should be abandoned. The breach assigned in the first count is, the non-payment of the money and costs on the day appointed. To this the fourth plea affords no answer. In *Longridge v. Dorville*, 5 B. & Ald. 117, it was held that the giving up of a suit instituted to try a question respecting which the law was doubtful,^(a) was a good consideration for a promise to pay a stipulated sum; and, therefore, where a ship, having on board a pilot required by law, ran foul of another vessel, and proceedings were instituted by the owners of the latter to compel the owners of the former to make good the damage, and the former vessel was detained until bail was given, and, pending such proceedings, the agents of the owners of the vessel damaged agreed, on the owners of the damaged vessel renouncing all claims on the other vessel, and on their proving the amount of the damage done, to indemnify them, and to pay a stipulated sum by way of damages; it was held, that, there being contradictory decisions as to the point whether ship-owners were liable for an injury done while their ship was under the control of the pilot required by law, there was a sufficient consideration to sustain the promise, made by the agents of the owners of the detained vessel, to pay the stipulated damages. [TINDAL, C. J. That was the case of a *558] relinquishment of a doubtful claim.^(a) The present *case is more like that put in 1 Roll. Abr. fo. 26, pl. 39. “Si A. fait un void assumpsit à B., et puis un étranger vient al B., et in consideration que B. relinquera l'assumpsit fait à luy per A., il assume a paier à luy 10*l.*, ceo n'est bon consideration à luy charger, par ceo que le primer assumpsit fuit void.”]^(b) The plea does not allege that the defendant knew, at the

(a) Vide post, 560 (a).

(b) Mich. 14 Jac., en brief d'error al Serjeant's Inn, enter Barnard & Simons, miss per Alltham, et agree per curiam, (translated, 1 Vin. Abr. 312, pl. 39.)

time he made the promise, that the plaintiff had no cause of action; and there is no allegation of fraud. [TINDAL, C. J. It states that there never was any cause of action, and that the plaintiff knew it.] At all events, the defendant was relieved from the threatened proceedings in Chancery. The plea does not, in distinct terms, negative any other consideration for the promise. It is in effect an informal plea of non assumpsit. [TINDAL, C. J. That is not pointed out as a ground of demurrer.]

The seventh plea discloses no answer to the first part of the promise. It sets up the fact of the order of ALDERSON, B., having been set aside by a rule of court. The first part of the promise, however, is wholly independent of the judge's order. Either, therefore, the defendant is wrong in stating that the promise was only deducible from the order, or it amounts to non assumpsit, which is pointed out as a cause of demurrer. Besides, the seventh plea is addressed also to the account stated, to which clearly it is no answer.

Kinglake, Serjt., (with whom was *Barstow*,) contra. The fourth plea is good. Under no circumstances can the forbearance to pursue an *unfounded* claim be a good consideration to support an assumpsit. In *Com. Dig. Action upon the case upon assumpsit*, (B. 1,) it is said: "The consideration upon which an assumpsit shall be *founded, must be for the benefit of the defendant, or to the trouble or prejudice of the plaintiff. And [*559 therefore a promise in consideration of the forbearance of a suit, is good; for, that is for the benefit of the defendant, though the action is not discharged; for, forbearance for a reasonable time is sufficient."(a) But "a promise in consideration of forbearance is not good, where there was originally no cause of action; as, if a note is given by a *feme covert*."(b) In *Atkinson v. Settree*, Willes, 482, it was held, that, if A. be illegally arrested by B. for a debt, a promise by C. to pay the debt claimed by B., in consideration of B.'s releasing A. out of custody, is void. So, in *Jones v. Ashburnham*, 4 East, 455, where the plaintiff declared that A., since deceased, was indebted to him so much, and that, after his death, in consideration of the premises, and that he, at the instance of the defendant, *would forbear and give day of payment* of the debt, (not stating to whom he was to forbear,) the defendant promised, &c.: this was held, on demurrer, to be no consideration for the promise; for, a promise can only be sustained on a consideration of benefit to the defendant or of detriment to the plaintiff; and, unless there were some person whom the plaintiff could have sued for his debt, his forbearance was no detriment to him. Lord ELLENBOROUGH there says: "How does the plaintiff show any damage to himself by forbearing to sue, when there was no fund which could be the object of suit; where it does not appear that any person in

(a) *Semb.* per Hob. 216, Cro. El. 387.

(b) *Lloyd v. Lee*, 1 Str. 94. This being inserted by a subsequent editor, is not citable as having the sanction of Comyns.

rerum naturâ was liable to be sued by him? No *right* can exist in this vague, abstract, and indefinite way. *Right* is a correlative term: there must be some object of right; some object of suit; some party who, in respect of *560] some fund *or some character known in the law, is liable; otherwise, there cannot be said to be any *right*. Has there been, then, any *suspension* of the plaintiff's right? Now, unless, a right is capable of being exercised, unless it can be put in force, there can be no suspension of it. And that it could have been exercised or put in force, but for the promise made by the defendant, is not shown. Then, what *forbearance* is shown? It must be a *forbearance* of a right which may be enforced with effect. It is true that a promise may be binding though there may be no actual benefit resulting to the party making it; because it is enough if the plaintiff may be damaged by it: but it does not appear here that the forbearance could produce any detriment to the plaintiff." *Longridge v. Dorville* was the case of a forbearance of a doubtful claim; (a) the defendants obtained the release of their ship, and the plaintiffs relinquished a security the law gave them; there was, therefore, abundant consideration for the promise. [MAULE, J. That decision is hardly consistent with some of the cases, wherein it has been laid down that no law is *doubtful*. *Jones v. Randall*, Cowp. 37, (b) is the earliest case in which a question of law is admitted to be of doubtful issue.] In *Edwards v. Baugh*, 11 M. & W. 641, the declaration alleged that disputes and controversies were pending between the plaintiff and the defendant respecting a sum of money, and that the defendant promised, in consideration of the *561] plaintiff's forbearing to sue, to pay him 100*l.*; and it *was held bad for want of an averment that any debt was originally due from the defendant to the plaintiff. So, in *Herring v. Dorell*, 8 Dowl. P. C. 604, a plaintiff having discharged one of two joint debtors, a promise by a third person to pay the debt, in order to obtain the discharge of the other from custody, was held to be void for want of consideration. Forbearance of an unfounded suit, is, in law, no forbearance at all. To avoid the difficulty suggested in *Smith v. Monteith*, 13 M. & W. 427, 2 Dowl. & L. 358, this plea distinctly alleges that there never was any cause of action in the former suit, and that the plaintiff knew it.

The seventh plea shows what the agreement between the parties really was, and alleges that the promise of the defendant arises by implication from the judge's order, which, upon the face of it, purports to have been drawn up by consent. [TINDAL, C. J. The plea states that there was no promise other than such as may be implied from the judge's order; and

(a) There, the matter in dispute was about to be decided in a tribunal governed by the civil law, with which the judges, *à fortiori* the lay parties to the compromise, might be presumed to be unacquainted.

(b) See *Rez v. Grosvenor*, 2 Stra. 1193. And see *Rez v. Justices of Buckinghamshire*, 1 B. & C. 485. In *Doe v. Avis*, Chitty's Statutes, 964, Lord Tenterden is reported to have said at nisi prius, "The words of the (stamp) act are so *ambiguous*, that the party objecting ought to make out the affirmative."

then it goes on to allege facts to show that no promise in law can be deduced therefrom. Does not that amount to non assumpsit? MAULE, J. The declaration states, that, in consideration that the plaintiff would forbear proceeding in the original action until a given day, the defendant promised to pay the money on that day, and agreed that a judge's order might be drawn up to secure such payment. The plea does not distinctly state that there was no such antecedent promise, but alleges that the only promise made was one deduced and implied from the order, and that the order had been set aside by rule of court. That clearly amounts to non assumpsit.]

Channell, Serjt., in reply. In nearly all the cases cited the alleged consideration was, forbearing to *sue*, no action having been commenced; here, the consideration is, "forbearing further to *proceed with a* [*562 *suit* already instituted. This distinction is recognised by Lord ABINGER, C. B., in *Edwards v. Baugh*, where he says: "A man may threaten to bring an action against any stranger he may happen to meet in the street. Where an action is *depending*, the forbearing to prosecute it is a sufficient consideration for a promise to pay a certain sum of money; for, besides other advantages, the party promising would save the extra costs, which he would have to pay, even if he were successful." In *Smith v. Monteith*, the declaration stated, that an action had been commenced and was depending by the plaintiffs against D., to recover a sum of 83*l.*; that D. was arrested and was in custody of the sheriff, under a *capias* duly issued in that action, and endorsed for bail for 69*l.*; that costs had been incurred in that action, to wit, 20*l.*; and that thereupon, in consideration that the plaintiffs would discharge D. out of the custody of the sheriff as to the said action, the defendant promised to pay the plaintiffs 88*l.* for the debt, interest, costs, and charges in the said action. It then alleged the discharge of D. by the plaintiffs, and a breach of the defendant's promise, in not paying the 88*l.*, or any part thereof. The defendant pleaded that D. was arrested and detained in custody, as alleged, by the procurement of the plaintiffs, and not otherwise, and that there was not, at the time of the commencing the said action against him, or during the prosecution thereof, or at the time of arresting him, or during any part of the time he was in custody, or at the time of the promise of the defendant, any claim or demand or cause of action against D., in respect of which the plaintiffs could, or were entitled to, recover in the said action against D.; that the plaintiffs did not, by discharging D., give, or part with, any available remedy against him, as the plaintiffs, at the time of the commencing and prosecuting the said action against him, *and of his arrest, [*563 and of the defendant's said promise, well knew, but which *the defendant, at the time of making the said promise, did not know*; that the said writ, arrest, and detaining in custody, and the proceedings in the said action, were, on the plaintiff's part, colourable only, and were not procured, commenced, or prosecuted by the plaintiffs with the intent to try

any doubtful question of law or fact. And the court held, that the declaration was good on general demurrer, the action against D. being presumed to be well founded, and the *capias* to have lawfully issued; but that the plea afforded no answer to the action, inasmuch as it did not show that the action against D. was wrongfully commenced, or that the arrest was illegal, or that the plaintiffs had been guilty of any fraud or duress in respect thereof. Here, the plea does not allege that the defendant did not know he had no defence to the original action. If good, it can only be so on the ground that it shows an entire absence of consideration; which it clearly does not: but, if it does, it amounts to non assumpsit. [TINDAL, C. J. That is not pointed out as a cause of demurrer.] One ground of demurrer assigned is ambiguity,^(a) which lets in this objection. [MAULE, J. The better course, probably, will be to allow the defendant to amend the fourth plea, by alleging that the plaintiff never had any available cause of action; upon which the plaintiff may take issue. I incline to think the plea bad, but it is doubtful whether the blot is hit by any of the causes of demurrer assigned.]

Kinglake, Serjt., for the defendant, declined to amend.

TINDAL, C. J. The only question now remaining is upon the demurrer *564] to the fourth plea. I am of opinion *that the fourth plea is a good and valid plea, on general demurrer. The declaration alleges that the plaintiff had commenced an action against the defendant in the Exchequer, to recover two sums of 1300*l.* and 700*l.* respectively, which action was about to be tried, and that, in consideration that the plaintiff would forbear proceeding in that action, until the 14th of December then next, the defendant promised the plaintiff that he would on that day pay the money, with interest, and costs; that the plaintiff, confiding in the defendant's promise, forbore prosecuting the action, and stayed the proceedings until the day named; but that the defendant did not pay the money or the costs. The fourth plea states that the plaintiff never had any cause of action against the defendant in respect of the subject-matter of the action in the court of Exchequer, which he, the plaintiff, at the time of the commencement of the said action, and thence until the time of the making the promise in the first count mentioned, well knew. By demurring to that plea, the plaintiff admits that he had no cause of action against the defendant in the action therein mentioned, and that he knew it. It appears to me, therefore, that he is estopped from saying that there was any valid consideration for the defendant's promise. It is almost *contra bonos mores*, and certainly contrary to all the principles of natural justice, that a man should institute proceedings against another, when he is conscious that he has no good cause of action. In order to constitute a binding promise, the plaintiff must show a good consideration, something beneficial to the defendant, or detrimental to the plaintiff. Detrimental to the plaintiff it

(a) See the mode in which the term "ambiguous" is applied, *supra*, 556.

cannot be, if he has no cause of action: and beneficial to the defendant it cannot be; for, in contemplation of law, the defence upon such an admitted state of facts *must* be successful, and the defendant will recover costs, which must be assumed to be a full compensation for all the legal damage he may sustain. The consideration, therefore, *altogether fails. On the part of the plaintiff it has been urged, that the cases cited for the defendant were not cases where actions had already been brought, but only cases of promises to forbear *commencing* proceedings. I must, however, confess, that, if that were so, I do not see that it would make any substantial difference. The older cases, and some of the modern ones, too, do not afford any countenance to that distinction. In *Tooley v. Windham*, Cro. Eliz. 206,(a) it is stated that the plaintiff had purchased a writ out of Chancery against the defendant, to the intent to exhibit a bill against him: upon the return of the writ, which was for the profits of certain lands, which the father of the defendant had taken in his lifetime, the defendant, in consideration he would surcease his suit, promised to him, that, if he could prove that his father had taken the profits, or had the possession of the land under the title of the father of the plaintiff, he would pay him for the profits of the land: and the court held that the promise was without consideration, and void. There the suit was in existence at the time of the making of the promise. So, in *Atkinson v. Settree*, Willes, 482, an action had been commenced at the time the promise was made. These cases seem to me to establish the principle upon which our present judgment rests; and I am not aware that it is at all opposed by *Longridge v. Dorville*. It may be that the peculiar circumstances of that case took it out of the general rule.(b) The ship was under detention by virtue of process from the Admiralty court: the event of the suit in that court was uncertain; neither party could foresee the result; and therefore the relinquishment by the plaintiff of his hold upon the ship, might well be a good consideration for the promise declared on. Here, however, there was no uncertainty: the defendant asserts, and the plaintiff admits, that there never was any cause of action in the *original suit, and that the plaintiff knew it. I therefore think the fourth plea affords a very good answer, and that the defendant is entitled to judgment thereon. [*565]

MAULE, J. I also am of opinion that the defendant is entitled to judgment on the fourth plea, though I think it extremely questionable whether that plea is not open to objection, provided it were rightly taken. Forbearance to prosecute a suit in which the plaintiff has no cause of action, (and in which, as the lord chief justice properly adds, he must eventually fail,) according to the authorities, is no consideration. It is no benefit to the defendant; and no detriment to the plaintiff. Costs are considered by the law a sufficient indemnification for a defendant who is sued, where

(a) More fully reported, 2 Leon. 105.

(b) Vide *supra*, 560 (a).

there exists no cause of action: consequently, the defendant, in contemplation of law, derives no benefit from a stay of the proceedings. In *Smith v. Monteith*, it seems to have been considered that the allegation in the plea—that the plaintiff had not any claim or demand or cause of action against the original defendant, in respect whereof the plaintiff was entitled to recover the sum which the defendant promised to pay,—did not sufficiently show that the plaintiff must necessarily have failed in the original action; and it may be doubted whether the fourth plea here does sufficiently show that there was no consideration for the defendant's promise, by reason of the plaintiff having no cause of action in the former suit, and that, therefore, he must necessarily have failed in that suit. That objection would, I think, have shown the fourth plea pleaded in this case, to be bad, provided the objection had been properly pointed out as a cause of demurrer. But, on general demurrer, I think the plea must be taken *impliedly* to allege that the plaintiff must necessarily have failed, and is, therefore, sufficient, the absence of a *direct* allegation to that effect *567] being only ground of special demurrer. It *has been contended that this objection is specially pointed out by that part of the demurrer which objects to the plea on the ground that it is *ambiguous*. That, however, is not, in my opinion, a sufficient assignment of this cause of demurrer, within the statute. Though I feel bound to state my opinion, I confess I should not be much surprised if a court of error should come to a different conclusion upon the doubt suggested.

CRESSWELL, J. The declaration in this case is founded upon a promise by the defendant to pay certain moneys in consideration of the plaintiff's forbearing to proceed with an action pending in the court of Exchequer. The answer set up by the fourth plea, is, that the plaintiff never had any cause of action against the defendant in respect of the subject-matter of that suit, which the plaintiff well knew. It has been surmised, in the course of the argument, that there is a distinction between abstaining from *commencing* an action, and forbearing to prosecute one *already commenced*. In the older cases, I find no such distinction. Lord Coke lays it down broadly, (a) that the staying of an action that has been unjustly brought, is no consideration for a promise to pay money. I cannot help thinking, on general principles, that the staying proceedings in an action brought without any cause, is no good consideration for a promise such as is relied on here. The plea, in plain terms, avers that the plaintiff never had any cause of action, and that he well knew it. Are we to assume that the defendant might, by some slip in *568] pleading, have failed in his defence to that action, if it *had proceeded? I think not. On general demurrer, the plea appears to

(a) At common law, *ut videtur*, no reference appearing to be made to the 23 H. 8, c. 15, which gave costs to defendants in certain actions, or to the 4 Jac. 1, c. 3, which extended the remedy to all actions in which the defendant succeeded upon verdict, or the plaintiff was *non-suited* after appearance, (i. e. in which the plaintiff was *non-prossed* or *non-suited*.)

me to be sufficient; and none of the causes of demurrer specially assigned, in my judgment, hits the point made by my brother *Channell*.

ERLE, J. It appears to me also that the fourth plea is sufficient. The declaration states that the plaintiff had commenced an action against the defendant in the court of Exchequer to recover certain moneys, that the defendant had pleaded various pleas on which issues in fact had been joined, which were about to be tried, and that, in consideration that the plaintiff would forbear proceeding in that action until a certain day, the defendant promised to pay. The issues joined on that record, therefore, were perfectly well known and ascertained. The defendant pleads that the plaintiff never had any cause of action against him in respect of the subject-matter of the action in the Exchequer, which he the plaintiff, at the time of the commencement of the action, and thence until the time of the promise, well knew. I think the plea must be read as importing a distinct allegation, that, upon the issues joined in that action, whether of fact or of law, the plaintiff must have failed. Construing the plea in this way, I think it is a good plea, at least on general demurrer, and that the defendant is entitled to judgment thereon.

Judgment for the defendant on the fourth plea, and for the plaintiff on the seventh plea.(a)

(a) And see *Stone and Withypoll's case*, 1 Leon. 113; *Davies v. Warner*, Cro. Jac. 593; *Bard v. Bard*, lb. 602; *Kent v. Prat*, 1 Roll. Abr. 23, pl. 27, 28, (translated, 1 Vin. Abr. 309;) *Anon.* 1 Siderf. 31; *Penn v. Lord Baltimore*, 1 Ves. sen. 444; *Griffith v. Sheffield*, 1 Eden, 73, 76; *Lofts v. Hudson*, 2 Mann. & Ryl. 481; lb. 482, n.; *Wilkinson v. Byers*, 1 A. & E. 106, 3 N. & M. 853; *Home v. Booth*, 3 M. & G. 709, 4 Scott, N. R. 526; *Skeate v. Beale*, 11 A. & E. 983, 3 P. & D. 597; *Flight v. Leman*, 4 Q. B. 883; *Fivaz v. Nicholls*, ante, 501; 2 Wms. Saund. 137 c., note (b).

*COXHEAD v. RICHARDS. Jan. 31.

[*569

C., the mate of a ship, sends to B., a stranger, a letter charging A., the captain, with gross misconduct. B. shows this letter to D., the owner, who dismisses A.

Held, by Tindal, C. J., and Erle, J., that the showing of the letter by B. to D. was a privileged communication.

Held, by Colkman and Cresswell, J.s., to be not privileged.

CASE, for a libel. The declaration stated, that, before the committing of the grievances by the defendant as thereafter mentioned, the plaintiff had been and was a mariner and commander of vessels, and, as such mariner and commander, had always conducted himself with care, skill, and propriety; that, before the time of the committing of such grievances, to wit, on the 1st of December, 1838, he had been retained, employed, and appointed, for certain reward to him the plaintiff, by one John Ward, to command, and be master and captain of, and then was master, commander, and captain of, a certain vessel of the said John Ward, called *The England*, upon and for a certain voyage then about to be made by the said vessel: that, before the committing of such grievances, to wit

on the day and year aforesaid, he, the plaintiff, being such master, captain, and commander as aforesaid, and, as such, being on board of such vessel, and having the care and command thereof, and divers, to wit, twenty persons, being on board of such vessel, set sail and departed on her said voyage from London to and for Llanelly, which last-mentioned place the said vessel went to in part prosecution of her said voyage, with the plaintiff and the said crew; that, in sailing and proceeding to the last-mentioned place, the said vessel, the plaintiff being such master, captain, and commander as aforesaid, passed by a certain island called The Isle of Wight, otherwise called The Wight, and also by part of a foreign coast, called the French coast, and also by a certain rock in the ocean, called The Runnelstone Rock; that, before the committing of such grievances,

*570] the said vessel, after she *had so set sail and departed as aforesaid, to wit, on the 12th of December, 1838, arrived at Llanelly aforesaid; that the plaintiff continued to be, and was, such master, captain and commander of the said vessel as aforesaid, and, as such, was on board thereof, and had the care and command thereof, from the time the said vessel departed and set sail as aforesaid, until and upon her arrival at Llanelly aforesaid: yet that the defendant well knowing the premises, but contriving and intending to injure the plaintiff, and to bring him into public scandal, infamy, and disgrace, and cause it to be suspected and believed that he the plaintiff was a drunkard, and unfit to be trusted with the command of the said vessel, or any other vessel, and that the said vessel, while the plaintiff was so on board and had the care and command thereof as aforesaid, had been in danger by means of the drunkenness and default of the plaintiff, and to deprive him of the means of supporting himself, theretofore, to wit, on the 30th of December, 1838, falsely, &c., did publish, &c., of and concerning the plaintiff, and of and concerning him as such master, captain, and commander as aforesaid, and of and concerning the said vessel, and of and concerning the same while under the care and command of the plaintiff, and of and concerning the said persons on board the same, and of and concerning the said voyage from London to Llanelly aforesaid, and of and concerning the said John Ward, and of and concerning the said island, and of and concerning the said part of the said foreign coast, and of and concerning the said rock, a certain false, scandalous, malicious, and defamatory libel, in a certain part of which libel there was and is contained, amongst other things, the false, scandalous, malicious, and defamatory matter following of and concerning the plaintiff, &c., &c., that is to say, "Llanelly, December 12th, 1838. My dear sir,—I hasten to write to you,

*571] and beg your advice on a very important *affair, which I will endeavour to explain to you in as concise a manner as it will admit of. You must know, then, that I have had to navigate the ship (meaning the said vessel) much of the passage (meaning the said voyage from London to Llanelly aforesaid;) the captain, (meaning the plaintiff,) from the time of our passing The Wight, (meaning the said island,) having been in

a state of intoxication. We (meaning the said persons on board the said vessel) ran into great risk on the French coast, (meaning the said part of the said foreign coast,) before I actually found out what was the matter with him (meaning the plaintiff). He (meaning the plaintiff) then kept to his cabin night and day, without appearing at meals; only occasionally coming on deck when any thing was reported to him (meaning the plaintiff). This was my most anxious time; for, he (meaning the plaintiff) vociferated orders, and captain's orders must be obeyed, unless the mate will mutiny and take charge. I was compelled for our safety to do this at last; and only just saved the ship (meaning the said vessel) from being dashed on the Runnelstone Rock (meaning the said rock) by a rapid movement of the helm and sails, in the performance of which I was promptly obeyed by the crew. He (meaning the plaintiff) had just left the deck, happily, to which I had summoned him (meaning the plaintiff) on sighting the Longship's light, for which he (meaning the plaintiff) then shaped a course. It was dark on Saturday morning. I suppose after that he freshened the nip; for, he (meaning the plaintiff) lay in bed with his clothes on, insensible to what was passing, till I again roused him (meaning the plaintiff) to say we were on the Welch coast, whither I managed to get on Saturday and Sunday. Being anxious, for his (meaning the plaintiff's) sake, that he (meaning the plaintiff) should be in a fit state to receive the pilot, I by means of the steward removed *all the liquor from his (meaning the plaintiff's) cabin, and at last got him (meaning the plaintiff) sober, frequently giving him (meaning the plaintiff) tea, &c. &c. Sunday and yesterday we were becalmed, so did not arrive till to-day. Now, how shall I act? It is my duty to write to Mr. Ward (meaning the said John Ward); but the captain, (meaning the plaintiff,) who I believe a good man, has a wife and family. These, my doing so would ruin. I would not for all the world do that. I would rather, much rather, run all the risk of going to India with a drunkard, who would drink in winter time, in the English Channel, and leave his mate to take her across the Bristol Channel; and that is running no small risk. Yet better that than ruin him (meaning the plaintiff). But my character is dear to me; and I may be ruined by the ship running on shore while I have charge of the deck,—as might have happened in the case of The Runnelstone Rock (meaning the said rock,) the breakers on which, Providence gave me a sight of, in time to wheel her (meaning the said vessel) round. We may not always be so fortunate. The sea foamed close under our quarter as we (meaning the said vessel and the persons on board the same) passed it, (meaning the said rock;) and we (meaning, &c.) just shaved the buoy upon it (meaning the said rock). We made the passage between Scilly and The Land's End. Of course, nothing has transpired between the captain (meaning the plaintiff) and me. Since his (meaning the plaintiff's) recovery, we are as sociable as before. He (meaning the plaintiff) wondered what could have made him (meaning the plaintiff) so ill. He (mean-

ing the plaintiff) fancied it must be some new milk we got in the Downs: and I made no reply. He (meaning the plaintiff) is excessively civil to me. But he (meaning the plaintiff) need not fear; though, as *573] everybody on board knows it, it is very likely sooner or *later to reach Mr. Ward's (meaning the said John Ward's) ears. We had a contrary wind across the Bristol Channel; and at one time I had thoughts of bearing up for the nearest port, and giving her (meaning the said vessel) in charge of a pilot: but the above consideration, viz. his (meaning the plaintiff's) wife and family, deterred me: and, as I received every assistance from the second mate, who is a steady young man and lives with us in the cabin, I determined on working her (meaning the said vessel) over to Carmarthen. The captain (meaning the plaintiff) also, in a lucid interval, now and then implored me to take care of the ship, (meaning the said vessel,) like a good lad and dear boy. I pitied him, so stood on. Pray write me soon your advice how to act. Shall I let all pass, and go through the voyage, or get my discharge and a written good character from the captain, (meaning the plaintiff,) saying that personal differences make it necessary that we part? Then, again, I shall offend Mr. Ward, (meaning the said John Ward,) for leaving his ship (meaning the said vessel) in the lurch; for, the second will leave if I do. Your advice shall be my guide: only, pray keep the affair a secret from Mr. Ward, (meaning the said John Ward.) I could suffer any thing rather than that should be so." By means of the committing of which grievances the plaintiff had been and was greatly injured in his said good character, and brought into public scandal, &c., with divers good and worthy subjects of this realm, inasmuch that divers of those subjects, and particularly the said John Ward, had, on occasion of the committing of the said grievances, from thence suspected and believed, and the said John Ward still did suspect and believe, the plaintiff to have been and to be a drunkard and a person unfit to be trusted with the command of the said vessel, or any other vessel, *574] and also by *reason thereof the said John Ward afterwards, to wit, on the day and year last aforesaid, refused and declined to retain and continue the plaintiff to command and be master and captain of the said vessel, as he otherwise would have done, and then discharged and dismissed the plaintiff from the command of the said vessel, and from the retainer and employ of the said John Ward; and by reason thereof he the plaintiff had not only lost and been deprived of the support, gains, &c., which might and would otherwise have arisen and accrued to him from and by reason of his being so retained and employed as aforesaid, but had from thence remained and continued and still was out of employ and deprived of the opportunity of supporting himself by honest and industrious means, and had been and was, by means of the premises, otherwise greatly injured and damnified, &c.

The defendant pleaded—first, not guilty—secondly, a justification, alleging all the material statements in the libel to be true—thirdly, that

the said John Ward did not, by reason of the publishing of the supposed libel by the defendant as in the declaration mentioned, refuse or decline to retain and continue the plaintiff to command and be master and captain of the said vessel, nor did he by reason thereof dismiss and discharge the plaintiff from the command of the said vessel, or from the retainer and employ of the said John Ward, in manner and form as in the declaration in that behalf alleged.

The plaintiff joined issue on the first and third pleas, and replied *de injuriâ* to the second.

The cause was tried before TINDAL, C. J., at the sittings in London after Michaelmas term, 1843. The plaintiff, a mariner, had been some years in the employ of Ward, the ship-owner, and was commander of The England upon the voyage mentioned in the declaration. *Cass, [*575 who was an intimate friend of the defendant, was the first mate. On receipt of Cass's letter, the defendant showed it to a naval friend, one of the Elder Brethren of The Trinity House, and also to Soames, an extensive ship-owner, and, in accordance with their advice, communicated it to Ward, who immediately sent another captain down to Llanely to supersede the plaintiff in the command of The England, and thenceforth ceased to employ the plaintiff. It did not appear that Ward had instituted any inquiry into the truth of the charges against the plaintiff, contained in Cass's letter.

Cass and the second mate were both called as witnesses on behalf of the defendant; but they failed to sustain the justification. It was, however, contended that the defendant was entitled to a verdict on the first issue, on the ground that the communication of the letter to Ward was confidential and privileged.

On the other hand, it was insisted that the defendant was liable, notwithstanding the absence of proof of express malice; there being nothing in the circumstances to render the communication excusable—no relation between the parties, no interest in the defendant, and no moral duty rendering it incumbent on him to make it.

The lord chief justice told the jury, that the occasion and circumstances under which the communication of the letter took place were such, as, in his opinion, to furnish a legal excuse for making the communication; that the inference of malice, which the law, *primâ facie*, draws from the bare act of publishing any statement false in fact, containing matter to the reproach and prejudice of another, was thereby rebutted; and that the plaintiff, to entitle himself to a verdict, must show malice in fact: concluding by telling them that they should find their verdict for the defendant, if they thought the communication was strictly honest on his *part, and made solely in the execution of what he believed [*576 to be a duty; but for the plaintiff, if they thought the communication was made from any indirect motive whatever, or from any malice against the plaintiff.

The jury returned a verdict for the plaintiff on the second and third issues, and for the defendant on the first.

Sir *T. Wilde*, Serjt., in Hilary term, 1844, obtained a rule nisi for a new trial, on the ground of misdirection.

Talfourd, Serjt., in Easter term, 1844,(a) showed cause. The question was properly submitted to the jury. The defendant, having received from a person whom he had known for many years, a letter containing statements of vital importance to the interests of Mr. Ward, the owner of the vessel, respecting the conduct of his captain, and honestly believing those statements to be true, after having sought advice from persons who were peculiarly qualified to give it, communicated the contents to Mr. Ward. The circumstances clearly negative the inference of malice which the law ordinarily draws from the unauthorized publication of defamatory statements. It is true the defendant had no interest in the matter, and that he stood in no particular relation either to Ward or to Cass. This case, therefore, wants the ingredients that have in some of the cases been held to make the publication excusable. But the question is whether this was not a communication which, according to the exigencies of society, he was morally bound to make. The earliest cases upon this subject are *577] to be found in Buller's Nisi *Prius, 7th ed. p. 8, in which the law is thus laid down: "Where words are spoken in confidence and without malice, no action lies; therefore, where A., a servant, brought an action against her former mistress for saying to a lady who came to inquire for the plaintiff's character, that, she was saucy and impertinent, and often lay out of her own bed, but was a clean girl, and could do her work well; though the plaintiff proved that she was by this means prevented from getting a place; yet, per Lord MANSFIELD, this is not to be considered as an action in the common way for defamation by words; but that the gist of it must be malice, which is not implied from the occasion of speaking, but should be directly proved; that it was a confidential declaration, and ought not to have been disclosed: *Edmondson v. Stevenson*. But if, without ground, and purely to defame, a false character should be given, it would be a proper ground for an action: *Vanspike v. Cleyson*, Cro. Eliz. 541. So, in an action for saying of a tradesman, 'He cannot stand it long; he will be a bankrupt soon,' where special damage was laid in the declaration, viz., that one Lane refused to trust the plaintiff for a horse; Lane, the person named in the declaration, was the only witness called for the plaintiff; and, it appearing on his evidence, that the words were not spoken maliciously, but in confidence and friendship to Lane, and by way of warning to him, and that in consequence of that advice he did not trust the plaintiff with the horse, PRATT, C. J., directed the jury, that, though the words were otherwise actionable; yet, if they should be of opinion that the words were not spoken out of malice, but in the manner before mentioned, they ought to find the defend-

(a) The judges present being Tindal, C. J., and Coltman, Erskine, and Cresswell, Ja.

ant not guilty; and they did so accordingly, *Herver v. Dowson*," C. B. sittings after T. T. 5 G. 3. [CRESSWELL, J. In *Cockayne v. Hodgkisson*, 5 C. & P. 543, PARKE, B., lays it down, that every wilful *unauthorized publication, injurious to the character of another, is a libel; but that, where the writer is acting on any duty, legal or moral, towards the person to whom he writes, or where he has, by his situation, to protect the interest of that person, that which he writes under such circumstances is a privileged communication, and no action will lie for what is thus written, unless the writer be actuated by malice. If that be correct, the question here is, whether this defendant was bound by any moral duty to make the communication he did.] He had a moral duty to protect the lives of the crew, and the property of the owner and charterers, which he had just grounds for believing to be in danger. In *Wright v. Woodgate*, 2 C., M. & R. 573, Tyrwh. & G. 12, Gale, Exch. 329, PARKE, B., says: "The proper meaning of a privileged communication is only this; that the occasion on which the communication was made, rebuts the inference *prima facie* arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact—that the defendant was actuated by motives of personal spite and ill-will, independent of the occasion on which the communication was made." The cases of *Pattison v. Jones*, 8 B. & C. 578, 3 M. & R. 101, and *Child v. Affleck*, 9 B. & C. 403, 4 M. & R. 338, fully sustain the direction on the present occasion. In *Todd v. Hawkins*, 2 M. & Rob. 20, 8 C. & P. 88, it was held that a letter from a son-in-law to his mother-in-law, volunteering advice respecting her proposed marriage, and containing imputations upon the person whom she was about to marry, was a privileged communication, and not actionable, in the absence of malice: and ALDERSON, B., observed, "There are warm expressions, no doubt, in the letter; but casual expressions should not induce you (the jury) to find the *defendant guilty, if he were really acting *bona fide* when he used them; for it is for the common good of all that communications between parties situated as those were, should be free and unrestrained." In *Kine v. Sewell*, 3 M. & W. 297, A., having undertaken to build a house for B., employed C., a carpenter, to do some of the wood-work, for which A. had given an estimate. The bill sent in having exceeded the estimate, B. applied to D. to recommend him a surveyor to measure the work, upon which D. told B. that he had seen C. take away some of the quarterings; B. informed A. of it, who came to D. and asked him did he say so; to which D. answered, "Yes, I saw the man employed by you take from B.'s house two long pieces of quartering: I hallooed to the man." In an action of slander brought by C. against D., the judge left it to the jury to say whether the words imputed felony; and, if they thought they did, told them that still the plaintiff was not entitled to recover, unless he showed express malice, or the jury believed from the circumstances that the defendant was actuated by malicious motives: and the court held the

direction right. The law is broadly and well laid down in the case of *Toogood v. Spyring*, 1 C., M. & R. 181, 4 Tyrwh. 582, by PARKE, B., who says: "In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another, (within the well-known limits as to verbal slander;) and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice *580] which the law draws from unauthorized communications, and affords *a qualified defence, depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected, for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits." In *Woodward v. Lander*, 6 C. & P. 548, it was held that a letter written to the postmaster-general, or to the secretary to the general post-office, complaining of misconduct in a post-master, is not a libel, if it was written as a *bonâ fide* complaint, to obtain redress for a grievance that the party really believed he had suffered; and that particular expressions are not to be strictly scrutinized, if the intention of the defendant was good. Cases of communications to official persons are not, perhaps, very analogous. But, in *Shipley v. Todhunter*, 7 C. & P. 680, it was ruled by TINDAL, C. J., that a man has a right to communicate to another any information he is possessed of in a matter in which they have a mutual interest; that it is a perfectly legal and justifiable object for one to induce another to become a party to a suit as to a subject-matter in which both have an interest; and that it is not because strong or angry language is used in such a communication, that it will be a libel; but that the jury must go further, and see, not merely that the expressions are angry, but that they are malicious. The special damage alleged in the declaration in this case, is clearly not a damage that is fairly and legitimately the result of the communication of the letter. It was the duty of Mr. Ward to make inquiry into the truth of the aspersions cast upon the character of the captain, before he acted upon the defendant's information.

Sir T. Wilde, Serjt., (with whom was Bramwell,) in support of the rule. *581] The publication of the letter by *the defendant was wholly inexcusable. He had no interest in the ship or in the freight; he stood in no such relation, either to the owner, the captain, or the mate, as could impose upon him any duty, legal or moral, to act as he did. The subject-matter of the communication was not so pressing as to require him to act on the instant: there was ample time for inquiry into the truth of the statement, seeing that the ship was not to sail from Llanelly for at least three weeks,^(a) and yet none was made. The writer of the letter expressly

(a) This appeared from a part of the letter that was not set out in the declaration.

cautions his friend (a) to abstain from doing the very act which has caused all the injury of which the plaintiff complains, viz., showing the letter to Mr. Ward. There is nothing in the law of England to justify a party in thus becoming a volunteer in the propagation of slander. Unless the circumstances rendered the occasion of the publication lawful, there was no necessity to prove *express* malice: the act being unauthorized, and injurious to the plaintiff, the law implies that it is malicious. It is suggested on the part of the defendant, that, in showing the letter to Mr. Ward, he acted in the honest and *bonâ fide* execution of a moral duty. But, what is there to give rise to any moral obligation on the defendant to repeat the slander? Did he owe no moral duty to the plaintiff, to abstain from publishing injurious statements until he had by inquiry satisfied himself that they were founded in truth? There are various occasions upon which, for the general convenience of society, communications that would otherwise be unlawful, are held to be excusable; such as *bonâ fide* communications, whether on inquiry or otherwise, as to the characters of servants; as in *Rogers v. Clifton*, 3 B. & P. 587; *Pattison v. Jones*, 8 B. & C. 578, 3 M. & R. 101, and **Child v. Affleck*, 9 B. & C. 403, 4 M. & R. 338. [*582 So, in the case of inquiries made touching the solvency of a trader; answers given *bonâ fide* are excused, even though the party be mistaken. So, the communication is privileged, where it relates to a matter in which the party uttering the defamatory matter, is interested, or where the parties have a common interest, as in *McDougall v. Claridge*, 1 Campb. 267, and *Shipley v. Todhunter*, 7 C. & P. 680. But, according to the argument urged on the part of the defendant, any person who hears a statement to the prejudice of another may, without inquiry as to its truth or falsehood, lawfully communicate it to any one who may have an interest in the well-doing of the slandered man. That is totally at variance with all legal principle. In *Bromage v. Prosser*, 4 B. & C. 247, 6 D. & R. 296, BAYLEY, J., says: "Malice, in common acceptation, means ill-will against a person; but, in its legal sense, it means a wrongful act, done intentionally, without just cause or excuse." "In an ordinary action for words, it is sufficient to charge that the defendant spoke them *falsely*; it is not necessary to state that they were spoken *maliciously*. But, in actions for such slander as is *primâ facie* excusable on account of the cause of speaking or writing it, as in the case of servants' characters, confidential advice or communications to persons who ask it or have a right to expect it, malice in fact must be proved by the plaintiff." The proposition laid down by PARKE, J., in *Cockayne v. Hodgkisson*, 5 C. & P. 549, does not embrace the case now under consideration. He says, p. 543: "Every wilful unauthorized publication, injurious to the character of another, is a libel; and every such publication is, in a legal sense, *malicious." [*583 "But, where the writer is acting on any duty, legal or moral, towards the person to whom he writes, or where he has, by his situation,

(a) After saying "It is my duty to write to Mr. Ward."

to protect the interests of another, that which he writes under such circumstances is a privileged communication." That learned judge never could have meant to convey that the communication of defamatory matter, like this, would be a moral duty. The defendant owed a clear moral duty to the plaintiff to refrain from repeating the slander. In *Martin v. Strong*, 5 A. & E. 535, 1 N. & P. 29, it was held that communications made by one member of a charitable association to another, reflecting on the conduct of the medical attendant of the establishment, were not privileged; though, it seems, it would have been otherwise, if the communications had taken place at a meeting of the association held for the consideration of the medical man's conduct. The present case, however, clearly does not fall within any of the classes of privileged communications allowed by law. There is a total absence of interest on the part of the defendant, as well as of that sort of relation between the writer of the letter and the ship-owner, which could justify the exhibition of the letter to him. There was nothing to give rise to a semblance of duty, either legal or moral.

The court took time to consider their judgment: but, there being a difference of opinion amongst the judges who heard the case argued, and *ESKINE, J.*, (a) having retired from the bench, a second argument was directed.

The second argument took place in Easter term, 1845, before *TINDAL, C. J.*, and *COLTMAN, CRESSWELL*, and *ERLE, Js.*

*584] *Talfourd* and *Channell*, Serjts., for the defendant. The question is, whether, in point of law, the communication complained of necessarily imported malice. The law *prima facie* implies malice in the publisher of defamatory matter to the injury of another; but this presumption is liable to be rebutted by the circumstances of each particular case. That is shown by this, that the defence is admissible under not guilty, and need not be specially pleaded; which, though the court pronounced no opinion on the point in *Smith v. Thomas*, 2 N. C. 372, 2 Scott, 546, 4 Dowl. P. C. 333, (b) is now clear law. To sustain his action, the plaintiff must show that the publication was wrongful, and not justified by the occasion: *Lay v. Lawson*, 4 A. & E. 795, *Hearne v. Stowell*, 12 A. & E. 719. Formerly a greater latitude was allowed than can now be contended for: *Brooke v. Montague*, Cro. Jac. 90; *Delany v. Jones*, 4 Esp. N. P. C. 191. [*CRESSWELL, J.* Is not the rule this—whether the occasion is such as to rebut the inference of malice, if the publication is *bona fide*, is a question of law for the judge; whether the *bona fides* existed, is a question of fact for the jury?] Such undoubtedly is the rule. (c) [*TINDAL, C. J.* The mode of publishing goes to the latter point; as where the publication is in a newspaper.] Here, the defendant, who had been for some years on terms of intimacy with Cass, receives a letter from him, containing matters of a very alarming description relative to the conduct of the captain, which, though directly involving the safety of the ship, the

(a) The opinion of that learned judge is understood to have been in favour of the defendant

(b) And see *Popham*, 89.

(c) See *Hooper v. Truscott*, 2 N. C. 457, 2 Scott, 673

cargo, and the crew, he is strictly enjoined not to communicate to Ward, the owner. Having no knowledge of the plaintiff, or of Ward, the defendant adopts the only course that an honest and discreet *person, [*585 under such circumstances, could pursue: he consults with one of the Elder Brethren of the Trinity House, and with an eminent ship-owner; under whose advice, he, without any comment, shows the letter to Ward. What, then, was the owner's duty? Certainly not to dismiss the captain, without investigating the charges made against him. The dismissal was not the fair and legitimate consequence of the defendant's act.(a) The information was of the utmost importance to the owner: the only doubt arises from their being no relation of any kind between him and the defendant, and no application by him for information. The definition of a privileged communication given by PARKE, B., in *Wright v. Woodgate*, is perhaps as accurate as any that can be found. That the rule is founded on a consideration of the importance of the information to the party to whom it is given, is evident from the cases. In *Herver v. Dowson*, words of a tradesman "that he would soon be a bankrupt," spoken in confidence, and friendship, as a caution, were held not to be actionable. [CRESWELL, J. How does that agree with *Bromage v. Prosser*?] *Rogers v. Clifton*, *Pattison v. Jones*, and *Child v. Affleck*, were cases of servants' characters. In *M. Dougall v. Claridge*, it was held that a letter written confidentially to persons who employed A. as their solicitor, conveying charges injurious to his professional character in the management of certain concerns which they had intrusted to him, and in which B., the writer of the letter, was likewise interested, was not actionable. In **Padmore v. Lawrence*, 11 A. & E. 380, 3 P. & D. 209, the defendant, in the presence of a third person, not an officer of justice, charged the plaintiff with having stolen his property, and afterwards repeated the charge to another person, also not an officer of justice, who was called in to search the plaintiff, with the consent of the latter: and it was held that the statement was privileged, if the defendant believed in its truth, acted *bonâ fide*, and did not make the charge before more persons, or in stronger language, than was necessary; (b) and that it was a question for the jury, and not for the judge, whether the facts brought the case within this rule. In *Blake v. Pilfold*, 1 M. & Rob. 198, it was held that a letter written by a private individual to a public officer, complaining of the misconduct of a person under him, if made *bonâ fide*, and without malice, is not the subject of an action, though some of the charges may not be true. TAUNTON, J., there says: "Generally, where one man publishes libellous matter of another,

(a) Taking Ward to have been under *contract* to employ, he would appear to be alone responsible for the wrongful dismissal, notwithstanding legal, or even actual malice in the defendant; *Morris v. Langdale*, 2 B. & P. 284; *Vicars v. Wilcocks*, 8 East, 1, 2 Smith's Leading Cases, 300. If there was no contract, Ward—whose interests might be endangered by delay, and who had incurred no responsibility as the propagator of an injurious report,—would be under no legal obligation to investigate the truth of the charges made by Casa.

(b) *Quære*, of this restriction.

the law will presume malice in the writer, and the plaintiff will be enabled to recover, without giving any proof of a malicious motive in the defendant. But there are certain cases in which communications are (what the law terms) privileged, and where the occasion on which the communication is made, rebuts the inference of malice. In such a case, a plaintiff cannot support an action for the publication of the matters so communicated, without giving evidence from which a jury may come to the conclusion that the defendant was actuated by malicious motives. I allude to the occasions where a man, on being applied to, gives a character of a servant, or where he gives confidential advice, or where the occasion of the communication is such as *prima facie* affords an excuse for making it.

*587] In all these cases a plaintiff must give evidence of express "malice."

The rule laid down by PARKE, B., in *Toogood v. Spyring*, clearly embraces the present case. "In general," says that learned judge, "an action lies for the malicious publication of statements which are false in fact and injurious to the character of another (within the well-known limits as to verbal slander;) and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice which the law draws from unauthorized communications, and affords a qualified defence, depending upon the absence of actual malice. *If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected, for the common convenience and welfare of society;* and the law has not restricted the right to make them within any narrow limits." The like doctrine is held in *Cockayne v. Hodgkinson*, *Warr v. Jolly*, 6 C. & P. 497, *Woodward v. Lander*, *Shipley v. Todhunter*, and *Todd v. Hawkins*. Here, the communication made by the defendant to Mr. Ward, was made in the honest and *bona fide* discharge of a moral duty towards that gentleman.^(a) If the defendant had had any interest in the matter, or was in any way connected with Mr. Ward, there could be no doubt that the legal inference of malice would be rebutted by the occasion: but the question is, whether the rule is to be so limited, and whether the defendant was not morally bound to communicate to Mr. Ward the information he had received from Cass. [COLTMAN, J. Your argument would extend to the protection of

*588] a communication founded on mere "idle gossip." The communication would not be protected unless there were just grounds for believing the information to be true. [CRESSWELL, J. You would make the moral duty of communicating defamatory matter to one interested in the subject, to depend upon the source whence it comes, and upon whether the circumstances under which the communicating party received the information, made it *reasonable* for him to believe it to be true?] Precisely so.

(a) The jury must be taken to have negatived the *apparent* motive of the defendant, viz., a wish to obtain promotion for his friend Cass, the mate, at the expense of Coxhead, the *master*.

[CRESSWELL, J. That would lead to a very wide and inconvenient field of inquiry. ERLE, J. Suppose a conversation to take place in a public house between very disreputable people, from which it appears that A. intends to commit a felony in the house of B.; would not C., overhearing the conversation, be justified in communicating it to B.? The more disreputable the source of the information, the more ground for giving credence to it.] The characters of the parties would certainly be one test. Here, the character and situation of the writer of the letter, as well as of the captain, were known to Mr. Ward. If the defendant was bound to disregard the communication, so was the owner.(a) The letter clearly did not justify the captain's dismissal, and would have afforded no defence to an action for depriving him of the command.(b)

Sir *T. Wilde*, Serjt., and *Bramwell*,(c) for the plaintiff. The general point is of great importance, and the public are indebted to the court for giving it further consideration. Every man is responsible for an intentional injury done to another, unless the circumstances are such as to justify or to excuse it. In the present case, to entitle the plaintiff to maintain the action, he was not bound to show actual malice: it "was [589 enough if the publication of the libel took place under circumstances that deprived it of the protection which the law affords to communications of a class to which the term "privileged" is usually applied. The kind of malice necessary to be shown here, is that which is defined by BAYLEY, J., in *Bromage v. Prosser*. "Malice," says that learned judge, "in common acceptation, means ill-will against a person, but in its legal sense it means a wrongful act done intentionally, without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it of *malice*, because I do it *intentionally* and without just cause or excuse. If I maim cattle, without knowing whose they are, if I poison a fishery, without knowing the owner, I do it of *malice*, because it is a wrongful act, and done intentionally. If I am attainted of felony, and wilfully stand mute, I am said to do it *of malice*, because it is intentional, and without just cause or excuse.(d) And if I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury, whether I meant to produce an injury or not; and, if I had no legal excuse for the slander, why is he not to have a remedy against me for the injury it produces? And I apprehend the law recognises the distinction between these two descriptions of malice,—malice in fact and malice in law,—in actions of slander. In an ordinary action for words, it is sufficient to charge that the defendant spoke them *falsely*; it is not necessary to state that they were spoken

(a) So, *e converso*.

(b) Whether such action would lie, would depend upon the existence, or non-existence of a prospectively binding contract to employ, *supra*, 585.

(c) Having been in the cause before the end of H. T. 1840.

(d) 1 Russell on Crimes, 614 (i), 1st ed.; 3d ed. 483 (i).

maliciously. This is so laid down in Style's Reports, 392, and was adjudged, upon error, in *Mercer v. Sparks*, Owen 51, Noy, 35. The objection *there was, that the words were not charged to have been *590] spoken maliciously; but the court answered, that the words were themselves malicious and slanderous, and therefore the judgment was affirmed. But, in actions for such slander as is *prima facie* excusable on account of the cause of speaking or writing it, as in the case of servants' characters, confidential advice or communications to *persons who ask it or have a right to expect it*, malice in fact must be proved by the plaintiff; and in *Edmondson v. Stevenson*, Bull. N. P. 8, Lord MANSFIELD takes the distinction between those and ordinary actions of slander." It may be conceded, that, if the defendant here was under any moral obligation to communicate the letter in question to Mr. Ward, the action cannot be sustained. But, if he was under the pressure of no moral duty, what is there to distinguish this defendant from the rest of the world? There are expressions in some of the cases, and especially those at *nisi prius*, tending in a great degree to obscure the rule of law. But, on all occasions where the courts have given deliberate judgments, the law will be found to be uniformly stated in conformity with *Bromage v. Prosser*. Where a man is speaking on a lawful occasion, there is no presumption of law against him, and *express* malice must be proved. But, where the act is not justified by the occasion, the honesty of the party's intention, and his belief in the truth of the statement he makes, are wholly immaterial. It has been suggested that any one who hears a statement to the prejudice of another, is justified in repeating the slander to a party interested in the well-doing of the person slandered; or, in other words, in repeating it in a quarter in which the repetition will have the most injurious effect.^(a) That *591] surely cannot be law. What becomes of the old statute *against eaves-dropping,^(b) commented upon in the second Institute, 226? It never can be that any supposed moral duty will justify the repetition of all the idle gossip a man hears to the prejudice of his neighbour. See the consequences of holding this defendant not to be responsible for this communication. Cass would only be responsible for an injury that naturally and legally resulted from *his* act. So far from this defendant being authorized by Cass to communicate the slander to Mr. Ward, he was expressly and earnestly enjoined to refrain from so doing. He was forewarned of the ruin which such a course must inevitably entail, and which in the result has been entailed, upon the plaintiff. The convenience of trade and commerce requires considerable freedom of communication respecting the credit and responsibility of a trader: and yet a distinction is taken between one who answers inquiries, and one who volunteers information:

(a) Vide *suprà*, 587 (b).

(b) The statute usually referred to in connection with eaves-dropping, is Westm. I, c. 33, in which, however, eaves-dropping is not expressly mentioned. As to eaves-droppers, see *Kitch. Courts*, 20, 1 *Hawk. P. C.* book 1, c. 61, § 4, 2 *Hawk. P. C.* book 2, c. 10, § 59, 4 *Bl. Comm.* 169.

King v. Watts, 8 C. & P. 614.(a) [TINDAL, C. J. Suppose the defendant had gone to Mr. Ward, and told him he had received a communication that materially affected his interest, and Mr. Ward had then asked him to show the letter, would that have justified the production of it?] Possibly it might. Here, however, nothing of the kind took place: the defendant was a mere volunteer. The cases as to characters of servants, are not in point. Judges may have been wrong in supposing that a former master stands in a peculiar position. It may be said that the servant authorizes the master to libel him. But, right or wrong, the cases proceed upon that distinction. [ERLE, J. In those cases, it is perfectly immaterial whether the party was a volunteer: the sole question is, whether the information was given honestly *and *bonâ fide*. CRESSWELL, J. Mr. Justice BAYLEY deals much more clearly with the principle upon which this class of cases proceeds than Lord TENTERDEN does in *Pattison v. Jones*.] *Gettling v. Foss*, 3 C. & P. 160, and *Humphreys v. Miller*, 4 C. & P. 7, were also cases of information volunteered. *Martin v. Strong*, 5 A. & E. 535, 1 N. & P. 29, is an extremely strong authority for the plaintiff. The communication there, was one which the party might very reasonably have supposed he was justified in making; there was no imputation that he was actuated by any personal or sinister motive; and yet he was held liable. The general principle laid down by PARKE, B., in *Toogood v. Spyring*, is in favour of the plaintiff, assuming that he is right in contending that the communication in question was not made in the performance of a moral duty on the defendant's part. And there is nothing in the cases of *Cockayne v. Hodgkisson*, *Woodward v. Lander*, *Shipley v. Todhunter*, *Wright v. Woodgate*, or *Hearne v. Stowell*, that at all militates against this view of the matter. In *Fairman v. Ives*, 5 B. & Ald. 642, 1 D. & R. 252, 1 Chitt. R. 85, the communication was held to be privileged, the defendant acting in the fair and honest belief that he was addressing a party who had power to redress the grievance of which he complained. In *Brooks v. Blanshard*, 3 Tyrwh. 844, Lord LYNTHURST, C. B., says: "It is not merely because a communication is confidential that it is privileged, if it is volunteered by the party making it." What moral duty can there be in any man to inflict a direct, certain, and irreparable injury upon one, in order to protect another, in whom he has no interest, from a possible injury in the event of the information upon which he acts proving true? No authority has been produced to show the existence of such a duty. If the interest of the person receiving the information is the true *criterion, the party repeating the slander would not be protected if he were mistaken in the supposition that such interest existed: and yet the moral duty would exist as much in the one case as in the other. The moral duty should arise out of some relation between the parties. Here, the occasion did not justify the act, whether

(a) And see *Bennet v. Deacon*, post, 628.

done *bonâ fide* or otherwise. The defendant will have his remedy against Cass for having, by false statements, rendered him liable to this action.

Cur. adv. vult.

There being still a difference of opinion, the judges now delivered their opinions *seriatim*, as follows :—

TINDAL, C. J. This was an action upon the case for the publication of a false and malicious libel, in the form of a letter written by one John Cass, the first mate of a ship called *The England*, to the defendant ; the letter stating that the plaintiff, who was the captain of the ship, and then in command of her, had been in a state of constant drunkenness during part of the voyage, whereby the ship and crew had been exposed to continual danger : and the publication by the defendant was the communication by him of this letter to the owner of the ship, by reason whereof,—which was the special damage alleged in the declaration—the plaintiff was dismissed from the ship and lost his employment.

The defendant pleaded—first, not guilty—secondly, that the charges made by the mate against the plaintiff in his letter, were true—and, lastly, that the ship-owner did not dismiss the captain by reason, and in consequence of the communication of the letter to him.

Upon the last two issues a verdict was found for the plaintiff ; but, upon the first issue, for the defendant.

I told the jury at the trial, that the occasion and circumstances under *594] which the communication of this letter took place, were such, as, in my opinion, to furnish a legal excuse for making the communication ; and that the inference of malice,—which the law, *primâ facie*. draws from the bare act of publishing any statements false in fact, containing matter to the reproach and prejudice of another,—was thereby rebutted ; and that the plaintiff, to entitle himself to a verdict, must show malice in fact : concluding by telling them that they should find their verdict for the defendant, if they thought the communication was strictly honest on his part, and made solely in the execution of what he believed (a) to be a duty ; but, for the plaintiff, if they thought the communication was made from any indirect motive whatever, or from any malice against the plaintiff. And the only question now before us, is, whether, upon the evidence given at the trial, such direction was right.

There was no evidence whatever that the defendant was actuated by any sinister motive in communicating the letter to Mr. Ward, the ship-owner : on the contrary, all the evidence went to prove that what he did, he did under the full belief that he was performing a duty, however mistaken he might be as to the existence of such duty, or in his mode of performing it. The writer of the letter was no stranger to the defendant : on the contrary, both were proved to have been on terms of friendship with each

(a) A., a stranger, receives information respecting the misconduct of B., which he honestly misapplies to C. Is A. justified in causing the dismissal of C. from the service of D.?

other for some years; and, from the tenor of the letter itself, it must be inferred the defendant was a person upon whose judgment the writer of the letter placed great reliance, the letter itself being written for the professed purpose of obtaining his advice how to act under a very pressing difficulty. The letter was framed in very artful terms, such as were calculated to induce the most wary and prudent man (knowing the [*595 *writer) to place reliance on the truth of its details: and there can be no doubt but that the defendant did in fact thoroughly believe the contents to be true, amongst other things, that the ship, of which Mr. Ward was the owner, and the crew and cargo on board the same, had been exposed to very imminent risk, by the continued intoxication of the captain, on the voyage from the French coast to Llanelly, where the ship then was, and that the voyage to the Eastern Seas, for which the ship was chartered, would be continually exposed to the same hazard, if the vessel should continue under his command. In this state of facts, after the letter had been a few days in his hands, the defendant considered it to be his duty to communicate its contents to Mr. Ward, whose interests were so nearly concerned in the information; not communicating it to the public, but to Mr. Ward; and not accompanying such disclosure with any directions or advice, but merely putting him in possession of the facts stated in the letter, that he might be in a condition to investigate the truth, and take such steps as prudence and justice to the parties concerned required: in making which disclosure he did not act hastily or unadvisedly, but consulted two persons well qualified to give good advice on such an emergency—the one, an Elder Brother of the Trinity House—the other, one of the most eminent ship-owners in London: in conformity with whose advice he gave up the letter to the owner of the ship. At the same time, if the defendant took a course which was not justifiable in point of law, although it proceeded from an error in judgment only, not of intention, still it is undoubtedly he, and not the plaintiff, who must suffer for such error.

The only question is, whether the case does or does not fall within the principle, well recognised and established in the law, relating to privileged or confidential *communications; and, in determining this ques- [*596 tion, two points may, as I conceive, be considered as settled—first, that if the defendant had had any personal interest in the subject-matter to which the letter related, as, if he had been a part-owner of the ship, or an underwriter on the ship, or had had any property on board, the communication of such a letter to Mr. Ward would have fallen clearly within the rule relating to excusable publications—and, secondly, that if the danger disclosed by the letter, either to the ship or the cargo, or the ship's company, had been so immediate as that the disclosure to the ship-owner was necessary to avert such danger, then, upon the ground of social duty, by which every man is bound to his neighbour, the defendant would have been not only justified in making the disclosure but would

have been *bound* to make it. A man who received a letter informing him that his neighbour's house would be plundered or burnt on the night following by A. and B., and which he himself believed, and had reason to believe to be true, would be justified in showing that letter to the owner of the house, though it should turn out to be a false accusation of A. and B. The question before us appears, therefore, to be narrowed to the consideration of the facts which bear upon these two particular qualifications and restrictions of the general principle.

As to the first, I do not find the rule of law is so narrowed and restricted by any authority, that a person having information materially affecting the interests of another, and honestly communicating it, in the full belief, and with reasonable grounds for the belief that it is true, will not be excused, though he has no personal interest in the subject-matter. Such a restriction would surely operate as a great restraint upon the performance of the various social duties by which men are bound to each other, and by *597] which society is kept up. *In *Pattison v. Jones*, 8 B. & C. 578, 3 M. & R. 101, the defendant, who had discharged the plaintiff from his service, wrote a letter to the person who was about to engage him, unsolicited; he was therefore a volunteer in the matter; and might be considered as a stranger, having no interest in the business; but, neither at the trial, nor on the motion before the court, was it suggested that the letter was, on that account, an unprivileged communication; but it was left to the jury to say whether the communication was honest or malicious. Again, in *Child v. Affleck and Wife*, 9 B. & C. 403, 4 M. & R. 338, the statement, by the former mistress, of the conduct of her servant, not only during her service, but after she had left it, was held to be privileged. The rule appears to have been correctly laid down by the court of Exchequer, that, "if fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected, for the common convenience and welfare of society; and the law has not restricted the right to make them, within any narrow limits."^(a) In the present case, the defendant stood in a different situation from any other person; he was the only person in the world who had received the letter, or was acquainted with the information contained in it. He cannot, therefore, properly be treated as a complete stranger to the subject-matter of inquiry, ^(b) even if the rule excluded strangers from the privilege.^(c)

Upon the second ground of qualification—was the danger sufficiently *598] imminent to justify the communication—it is true, that the letter, which came to the defendant's *hands about the 14th of Decem-

(a) *Supra*, 579.

(b) He did not cease to be a stranger in point of *interest*, by ceasing to be a stranger in point of *knowledge*.

(c) In this view of the case, *quære*, whether the defendant would have once more become a stranger to the subject-matter of inquiry upon ceasing to be the *sole* depository of the information?

ber, contains within it the information that the ship cannot get out of harbour before the end of the month. It was urged that the defendant, instead of communicating the letter to the owner, might have instituted some inquiry himself. But it is to be observed that every day the ship remained under the command of such a person as the plaintiff was described to be, the ship and crew continued exposed to hazard, though not so great hazard as when at sea ; not to mention the immediate injury to the ship-owner which must necessarily follow from want of discipline of the crew, and the bad example of such a master. And, after all, it would be too much to say, that, even if the thing had been practicable, any duty was cast upon *the defendant*, to lay out his time or money in the investigation of the charge. (a)

Upon the consideration of the case, I think it was the duty of the defendant not to keep the knowledge he gained by this letter himself, and thereby make himself responsible, in conscience, if his neglect of the warnings of the letter brought destruction upon the ship or crew—that a prudent and reasonable man would have done the same ; that the disclosure was made, not publicly, but privately to the owner, that is, to the person who of all the world was the best qualified, both from his interest in the subject-matter, and his knowledge of his own officers, to form the most just conclusion as to its truth, and to adopt the most proper and effective measures to avert the danger ; after which disclosure, not the defendant, but the owner, became liable to the plaintiff, if the owner took steps which were not justifiable ; as, by unjustly dismissing him from his employment, if the letter was untrue. And, as all this was done with entire honesty of purpose, and in the full belief of the truth of the *infor- [*599 mation,—and that, a reasonable belief,—I am still of the same opinion which I entertained at the trial, that this case ranges itself within the pale of privileged communication, and that the action is not maintainable.

I therefore think the rule for setting aside the verdict and for a new trial, should be discharged.

COLTMAN, J. I regret much that I am unable in this case to agree with the opinion of my lord chief justice, that it is a sufficient justification of the defendant's conduct, that he acted *bonâ fide*, and without malice.

The facts of the case, which I consider as material, are, that, on the 14th of December, the defendant received from the mate of a ship belonging to Mr. Ward, a letter containing imputations against the captain, of constant drunkenness and unfitness for command, asking for the defendant's advice, and informing him that the ship was then at Llanelly, and would not sail thence before the end of the month. There was no intimacy between the defendant and Mr. Ward, nor any relation in business between them. The defendant, after consulting with two friends, by their advice communicated the letter to Mr. Ward.

(a) Vide *suprà*, 585, n.

I apprehend the rule of law applicable to questions of this nature is laid down with accuracy by the court of Exchequer in the case of *Toogood v. Spyring*, where it is said, "In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another, (within the well-known limits as to verbal slander;) and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice *600] which the law draws from unauthorized *communications, and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected, for the common convenience and welfare of society; and the law has not restricted the right to make them, within any narrow limits."

Communications of this nature have been commonly termed *privileged* communications; and the term, if not strictly accurate, is perhaps sufficiently so for practical purposes: and it has been generally held, and, in my judgment, rightly held, that the question whether a communication is privileged or not, is a question of law for the judge; but, in considering the question whether a communication is privileged or not, the condition necessary to make it privileged, must be assumed. What I mean by this remark, will be more intelligible by referring to the line of argument used on the discussion of the present motion. In the first argument of this case, many remarks were made on the mate's letter, tending to show that a man at all experienced in the ways of the world, could not have been duped by the statements in the letter, or have believed them to be true. But it appears to me that such a line of argument is inapplicable to the question of law—whether the communication was privileged; for, the question of law is, whether, assuming that the defendant really and *bonâ fide* believed the contents of the letter to be true, the occasion was such as justified the making the communication; in other words, according to the rule laid down by the court of Exchequer in *Toogood v. Spyring*, whether there was any duty, public or private, legal or moral, calling on the defendant to make the communication complained of. It cannot, I think, be said that there was any legal duty; was there any moral duty, calling on him to make it?

*601] *The necessity which exists in the transactions of society, for free inquiry, and for facilities in obtaining information for the guidance of persons engaged in important matters of business, has so far prevailed, that it has been established as a rule, that, for words spoken confidentially upon advice asked, no action lies, unless express malice can be proved: *Bromage v. Prosser*. The duty which may be supposed to exist, to give advice faithfully to those who are in want of it, has been allowed to prevail for the sake of the general convenience of business, though

with some disregard of the equally important rule of morality, that a man should not speak ill, falsely, of his neighbour. Even though the statement be not on advice asked, but is made voluntarily, that circumstance was said, in *Pattison v. Jones*, not necessarily to prevent the statement from being considered as privileged. Assuming, then, upon the authority of that case, that the circumstance of the communication being voluntary, is no insuperable bar to its being regarded as a privileged communication, we return to the consideration of the question, whether there was any moral duty, binding on the defendant, to make the communication now in question. And, on the best consideration I can give the subject, I think the duty was plainly the other way. The duty of not slandering your neighbour on insufficient grounds, is so clear, that a violation of that duty ought not to be sanctioned in the case of voluntary communications, except under circumstances of great urgency and gravity.

It may be said, that it is very hard on a defendant to be subject to heavy damages where he has acted honestly, and where nothing more can be imputed to him than an error in judgment. It may be hard : but it is very hard, on the other hand, to be falsely accused. It is to be borne in mind that people are but too apt rashly to think ill of others : the propensity to tale-bearing and *slander is so strong amongst mankind, and, [602 when suspicions are infused, men are so apt to entertain them without due examination, in cases where their interests are concerned, that it is necessary to hold the rule strictly as to any officious intermeddling by which the character of others is affected.

In the present case, the occasion was in no respect urgent. The vessel was not to sail till the end of the month. There was abundant time for the defendant to write to the mate, and for the mate to act as he should be advised ; or for the defendant to take any other steps to ascertain the truth of the statement, before he communicated it in a quarter where it was likely to be productive of so much injury to the plaintiff. It appears to me, therefore, that the communication ought not to be considered as being privileged, and that its being made *bond fide* did not entitle the defendant to a verdict : and, with the greatest deference to those who differ from me, and whose opinions are entitled to much more weight than that which I have formed, I think it my duty to state my own.

CRESSWELL, J. I cannot, without much regret, express an opinion in this case at variance with that which is entertained by my lord and one of my learned brothers. But, having given full consideration to the arguments urged at the bar, and the cases cited, and not being able to shake off the impression which they made in favour of the plaintiff, I am bound to act upon the opinion that I have formed. I will not repeat the facts of the case, which have been already stated, but proceed shortly to explain the grounds upon which my opinion rests.

There is no doubt that the letter published by the defendant of the plaintiff, was defamatory ; and the truth of its contents could not be proved.

*603] The plaintiff was, *therefore, entitled to maintain an action against the publisher of that letter, unless the occasion on which it was published made the publication of such letter a lawful act, as far as the plaintiff was concerned, if done in good faith, and without actual malice. To sustain an action for a libel or slander, the plaintiff must show that it was malicious; but every unauthorized publication of defamatory matter is, in point of law, to be considered as malicious. The law, however, on a principle of policy and convenience, authorizes many communications, although they affect the characters of individuals; and I take it to be a question of law, whether the communication is authorized or not. If it be authorized, the legal presumption of malice arising from the unauthorized publication of defamatory matter, fails, and the plaintiff, to sustain his action, must prove actual malice, or, as it is usually expressed, malice in fact. In the present case, the existence of malice in fact was negatived by the jury; and if my lord was right in telling them, that, in the absence of malice in fact, the publication of the letter was privileged, this rule should be discharged. It therefore becomes necessary to inquire within what limits and boundaries the law authorizes the publication of defamatory matter. Perhaps the best description of those limits and boundaries that can be given in few words, is to be found in the judgment of PARKE, B., in *Toogood v. Spyring*: "The law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned." It was not contended in this case that any *legal* duty bound the defendant to communicate to the ship-owner the contents of the letter he had received, nor was the communication made in the conduct of his

*604] own affairs, nor was his interest concerned: the *authority for the publication, if any, must therefore be derived from some *moral* duty, public or private, which it was incumbent upon him to discharge. I think it impossible to say that the defendant was called upon by any *public duty* to make the communication; neither his own situation nor that of any of the parties concerned, nor the interests at stake, were such as to affect the public weal. Was there then any *private* duty? There was no relation of principal and agent between the ship-owner and the defendant, nor was any trust or confidence reposed by the former in the latter; there was no relationship or intimacy between them; no inquiries had been made; they were, until the time in question, strangers: the duty, if it existed at all as between them, must, therefore, have arisen from the mere circumstance of their being fellow-subjects of the realm. But the same relation existed between the defendant and the plaintiff. If the property of the ship-owner on the one hand was at stake, the character of the captain was at stake on the other; and I cannot but think that the moral duty not to publish of the latter defamatory matter which he did not *know* to be true, was quite as strong as the duty to communicate to the

ship-owner that which he *believed* to be true. Was, then, the defendant bound by any moral duty towards the writer of the letter, to make the communication? Surely not. If the captain had misconducted himself, the mate was capable of observing it, and was as capable of communicating it to the owner as to the defendant. The crew were, in like manner, capable of observing and acting for themselves. The mate (if he really believed that which he wrote to be true) might, indeed, be under a moral duty to communicate it to his owner: but the defendant had no right to take that vicarious duty upon himself: he was not requested by the mate to do so, but was, on the contrary, enjoined *not* to make the communication.

*I will not attempt to comment upon the very numerous cases [605 that were quoted at the bar on the one side and on the other, but will advert to one or two which tend to explain the term "moral duty," and see whether it has ever been held to authorize the publication of defamatory matter under circumstances similar to those which exist in the present case. In *Bromage v. Prosser*, BAYLEY, J., in his very elaborate judgment, speaks of slander as "*prima facie* excusable on account of the cause of speaking or writing it, in the case of servants' characters, confidential advice, or communications to those who ask it or have a right to expect it." With regard to the characters of servants and agents, it is so manifestly for the advantage of society that those who are about to employ them should be enabled to learn what their previous conduct has been, that it may be well deemed the moral duty of former employers to answer inquiries to the best of their belief. But, according to the opinion of the same learned judge, intimated in *Pattison v. Jones*, it is necessary that *inquiry* should be made, in order to render lawful the communication of defamatory matter, although he was also of opinion that such inquiry may be invited by the former master. And in *Rogers v. Clifton*, CHAMBRE, J., quoted a similar opinion of Lord MANSFIELD's, expressed in *Lowry v. Aikenhead*, Mich. 8 G. 3, 3 B. & P. 594.

It was contended during the argument of this case, that the protection given to masters when speaking of the conduct of servants, was more extensive, and applied also to communications made to former employers; and *Child v. Affleck* was mentioned as an instance. But the communication to the former master was not made a ground of action in that case, and was introduced only as evidence that the statement made in answer to the inquiry of the new master was malicious. The *same [606 observation applies to *Rogers v. Clifton*; and it may be collected from that report that CHAMBRE, J., was of opinion, that, where statements are made which are not in answer to inquiries, the defendant must plead, and prove, a justification.

Again, where a party asks advice or information upon a subject on which he is interested; or where the relative position of two parties is such that

the one has a right to expect confidential information and advice from the other; it may be a moral duty to answer such inquiries and give such information and advice; and the statements made may be rendered lawful by the occasion, although defamatory of some third person, as in *Dunman v. Bigg*, 1 Campb. 269, and *Todd v. Hawkins*, 2 M. & Rob. 20, 8 C. & P. 88.

Two cases—*Herver v. Dowson*, Bull. N. P. 8, and *Cleaver v. Sarraude*, reported in *M'Dougall v. Claridge*, 1 Campb. 268—were quoted as authorities for giving a more extended meaning to the term “moral duty,” and making it include all cases where one man had information, which, if true, it would be important for another to know. But the notes of those cases are very short: in the former the precise circumstances under which the statement was made—see *King v. Watts*, 8 C. & P. 614, that such a statement made *without inquiry* is not lawful—and in the latter, the position of the defendant with reference to the Bishop of Durham, to whom it was made, are left unexplained. I cannot, therefore, consider them as satisfactory authorities for the position to establish which they were quoted: and, in the absence of any clear and precise authority in favour of it, I cannot persuade myself that it is correct, as, if established at all, it must
 *607] be at the expense of another moral duty, viz., not *to publish defamatory matter unless you *know* it to be true.

For these reasons, I am of opinion, that the rule for a new trial should be made absolute.

ERLE, J. In this case a rule nisi for a new trial was obtained on the ground of misdirection.

The plaintiff, who was the captain of a ship, brought his action for a publication of a libel in showing to the ship-owner a letter from the mate to the defendant, imputing misconduct to the captain.

The defendant, who was a stranger to the plaintiff, and but little known to the ship-owner, had reason to believe, from the contents of the letter, that the ship and crew were in danger of destruction if the letter was withheld, and that such danger would be averted if the letter was shown. The jury were directed to find for the defendant, if, in their judgment, the defendant acted *bonâ fide* in showing the letter; and this direction is the subject of objection.

The plaintiff contends that there was no evidence to rebut the presumption of malice arising from the publication of a libel; that there was no justifying occasion for the communication in question, because the defendant stood in no relation either to the ship-owner or to the captain, and had no interest in the ship or crew.

But the principle upon which communications may be said to be protected,—the presumption of malice being rebutted,—appears to me to be not restricted in the manner so contended for. Among such protected communications, there are some in which the protection is derived from the subject-matter alone, without regard to any relation in which the author

may stand, such as criticism and public comments: *Carr v. Hood*, 1 Campb. 355; *Parmeter v. Coupland*, 6 M. & W. 105.

*There are others in which the protection is derived from the relation in which the giver of the information stands to the person who is the subject of it; as in the case of a communication by a party in the conduct of his affairs where his interest is concerned: *Fairman v. Ives*, 5 B. & Ald. 642; *M'Dougall v. Claridge*, 1 Campb. 267; *Toogood v. Spyring*. [*608]

There is also another class in which the protection appears to me to be derived from the relation in which the receiver of the information stands to the person who is the subject of it; as in the case of information given to prevent damage from misconduct; and for this class I think it is not essential that the giver of the information should stand in any relation to the other parties.

It is clear that the rule is founded on a consideration of the importance of the information to the interest of the receiver. And this consideration has no reference to the source whence the information is derived.

Cases have been referred to in which such information was held to be justified, if the *bona fides* was found by the jury, and in which no mention is made of the defendant's being placed in any relation which made it a duty on his part to inform.

The notice to a vendor to beware of the plaintiff as purchaser, in *Hervey v. Dowson*, also the notice to a landlord of the misconduct of the plaintiff, his steward, in *Cleaver v. Sarraude*, also the notice to a next friend of an infant plaintiff in a chancery suit, to beware of the character of the plaintiff, as likely to create liability for costs, in *Wright v. Woodgate*, and the notice of a report of a run upon the bank of the plaintiff to a person being in the neighbourhood, and liable to be affected thereby, in *Bromage v. Prosser*, may be taken as examples.

A common application of the principle is, in the giving of the characters of servants; and this occurs *most frequently in respect of a former master's answer to an inquiry; and the rule is often expressed as if it were essential that the giver of the information should stand in the relation of former master. But, on considering the reason of the rule, and the authorities, that form of expression appears to me to be incorrect. [*609]

It is clear that the rule is founded on the interest of the receiver to know the character of the servant. It is also clear, that, if the giver of the information indulges any selfish motive in giving a bad character, he loses the protection, on the ground of express malice.

In *Rogers v. Clifton*, *Pattison v. Jones*, and *Child v. Affleck*, it was considered by some judges that a former master volunteering a character, would be justified if acting *bonâ fide*: but a former master so volunteering stands in no relation either to the servant or the new master; he is, in effect, a stranger, and is not called on by inquiry.

In *Blake v. Pilfold*, 1 M. & Rob. 198, the defendant, who stood in no

present or past relation to the plaintiff or his employers, was held justified in communicating the information he had received, on account of the interest which the employers of the plaintiff had in knowing his character.

One of the earliest cases on the protection to a former master in giving a character of a servant, is decided (a) as coming within the general principle respecting confidential communications, and not upon any consideration of the relation of master: *Edmondson v. Stevenson*, Bull. N. P. 8.

In the present case, the defendant, having reason (b) to believe he was in possession of information important to the ship-owner, in respect of his captain, gave it for the purpose of preventing a considerable damage *610] to his *property from misconduct; and, on this ground, appears to me to be justified.

The defendant also had reason to believe, that, by giving this information, he should save the lives of the crew; (c) and on this ground also, he appears to me to be justified in giving it, either to the crew, or to the ship-owner on their behalf, supposing always that the jury found that he acted with good faith.

Some objection was made to the mode of communication. But it appears to me to have been as cautious as could be required under the circumstances; and, if the defendant acted incautiously, or went to some degree beyond what may be thought to have been strictly required for his purpose, these were matters for the jury, as evidence of malice.

The evil likely to arise from protecting information *bonâ fide* given to prevent damage from misconduct; appears to me much less than that which would result from putting a stop to such information, by rendering the giver of it liable in damages, unless he has legal proof of the truth: and the circumstance of the information being officious, or without reasonable grounds, or of slight importance, ought to be appreciated by the jury. (d)

It follows, that in my judgment, the rule should be discharged.

The court being thus divided in opinion, the rule for a new trial fell to the ground, and the defendant retained his verdict. (e)

(a) Or, at least, is so classed by the editor.

(b) The finding was, that he did in fact believe.

(c) *Quere*, whether this is an inference of law or a fact to be considered, if warranted by the circumstances, by the jury.

(d) The finding of the jury in this case, *supra*, 590, does not seem to be inconsistent with the information having been of slight importance, and communicated officiously, and without reasonable ground.

(e) See the next case.

*BLACKHAM v. PUGH. Jan. 31.

[*611]

A., a trader, being indebted to B. upon an unexpired credit, employs C. to sell his goods by auction, and abvents himself, under circumstances sufficient to induce B. to believe that an act of bankruptcy has been committed. B. gives notice to C. not to pay over the proceeds to A., "he having committed an act of bankruptcy." In an action by A. against B. charging this notice as a libel, it was held by Tindal, C. J., and Coltman and Erle, Js., to be a privileged communication; *dissentiente*, Cresswell, J.

CASE, for a libel upon the plaintiff in the way of his trade.

The first count of the declaration stated, that the plaintiff, before and at the time of the committing of the several grievances by the defendant thereafter mentioned, was a trader within the meaning and intent of the laws and statutes in this realm relating to and concerning bankrupts, and carried on the trade of a currier, &c., to wit, in London, and had always exercised and carried on his said trade with integrity and punctuality of dealing, and had always been able and willing to pay, and had in fact always punctually paid, his just debts, and had never been in insolvent or bad circumstances, or committed an act of bankruptcy; and that by means of the premises the plaintiff, before and up to the time of the committing, &c., had deservedly obtained the good opinion and credit of all his neighbours, and other good and worthy subjects of this realm to whom he was in anywise known, &c.; that, before, &c., the plaintiff, being desirous of retiring from his said trade, had advertised for sale, and caused to be sold, by public auction, by certain persons carrying on the business of auctioneers under the name, style, or title of Southey & Son, his, the plaintiff's, stock in trade and implements of his said trade, and other goods and chattels being in and upon the shop and premises where he, the plaintiff, so carried on his said trade as aforesaid, and the proceeds of the said sale, amounting to 500*l.*, had, after such sale as aforesaid, been received by, and at the time of the committing, &c., remained in the hands of, Southey & Son, as such auctioneers; that, before the *time of the committing, &c., and before the time of such sale as there-
[*612] inbefore mentioned, the plaintiff had purchased divers goods of the defendant at or for the price or sum of 62*l.* 12*s.* 9*d.*, upon a certain credit, to wit, of two months; that such credit had not expired at the time of the committing, &c.; yet that the defendant, well knowing the premises, but greatly envying, &c., and wickedly and maliciously intending to injure the plaintiff in his good name, &c., and to cause it to be suspected and believed that the plaintiff had been and was in bad and insolvent circumstances, and had committed an act of bankruptcy, and was incapable of paying his just and true debts, &c., and also maliciously to prevent the plaintiff from receiving the proceeds of the said sale thereinbefore mentioned from Southey & Son, (a) theretofore, to wit, on the 27th of June, 1844, caused

(*) Both in this case and in *Coxhead v. Richards*, *supra*, 556, special damage was laid; but this circumstance was not treated as creating any distinction between these and other cases of libel. Here, indeed, that which is laid as a special damage, appears to be merely the wrongful refusal, if a solvent debtor, to pay what is shown by the declaration, and must be taken as against the plaintiff, to be a clear legal debt.

and procured to be written and published of and concerning the plaintiff, and of and concerning him in his said trade as aforesaid, a certain false, scandalous, malicious, and defamatory libel, of and concerning the plaintiff, and of and concerning him in his said trade, in the form of a notice written by the direction, and at the request, and by the order of the defendant, by certain persons then being the attorneys and solicitors of the defendant, to wit, &c., and directed and sent by the last-mentioned persons to Southey & Son, and containing, amongst other things, the false, scandalous, malicious, and defamatory matter of and concerning the plaintiff, and of and concerning him in his said trade, following, to wit:

*613] "Messrs. Southey & Son—We *hereby give you notice, and require you, not to part with the proceeds of the sale of the stock in trade, goods, chattels, and effects of H. J. Blackham, of, &c., (meaning the plaintiff,) which have been lately sold by you (meaning the said Southey & Son) by public auction on the premises, the said H. J. Blackham (meaning the plaintiff) having committed an act of bankruptcy;" that, by means of the committing, &c., the plaintiff was greatly injured in his good name, fame, and credit with and amongst all his neighbours and acquaintance, &c.; and that by means of the committing, &c.; and in consequence of the said notice so written and sent to Southey & Son as aforesaid, Southey & Son confiding in, and believing the truth of, the statement therein contained, detained the moneys so remaining in their hands as aforesaid, being the moneys arising from the said sale, and had wholly refused to pay the same to the plaintiff; that the plaintiff had in consequence thereof lost and been deprived of the use and benefit of the said moneys for a long space of time, to wit, from the time of the committing, &c., until the commencement of this suit; (a) and that the plaintiff also, by means of the premises, had suffered and undergone great annoyance, trouble, and pain of mind, &c.

To this count the defendant pleaded—first, not guilty; secondly,—to part of the declaration—that the plaintiff did not purchase any goods of the defendant upon a credit which had not expired at the time of the committing of the grievances, &c., *modo et formâ*; concluding to the country; thirdly, that, at the time of the committing of the grievances in the first count mentioned, the plaintiff was indebted to the defendant in 62l.

*614] 12s. 9d. for goods sold and delivered; (b) and that *this sum was then due, and that the plaintiff, being so indebted and being a trader, had committed an act of bankruptcy, by absenting himself from his place of business with intent to defeat and delay the defendant; verification.

(a) Vide *suprà*, 612, n.

(b) A *debitum in presenti solvendum in futuro* would have justified the notice to the auctioneers, supposing an act of bankruptcy had been committed; but the allegation of debt in the third plea could be supported only by proof of a debt actually due—*debitum solvendum in presenti*. The third plea appears to be wholly unnecessary; as the defendant could not proceed upon that plea unless the plaintiff failed to prove the fact traversed by the second.

The plaintiff joined issue on the first and second pleas, and to the third, replied *de injuriâ*.

The cause was tried before PARKE, B., at the summer assizes for the county of Surrey, in 1844. The facts were as follows:—The plaintiff was a currier and leather-seller, carrying on his trade in Union Street, Southwark. The defendant was a tanner. In April, 1844, the plaintiff purchased goods of the defendant to the amount of 62*l.* 12*s.* 9*d.*, upon the customary credit of two months. In June, the plaintiff, intending to wind up his concerns and retire from business, employed Messrs. Southey & Son, auctioneers, to dispose of his stock by public sale. The sale was accordingly advertised to take place on the premises on Wednesday, the 26th of June. On the following day, which was the customary collecting day in the trade, the defendant's collector called for payment of the account, when he found the goods all sold and in the course of being removed, no person being upon the premises to explain the plaintiff's absence. The defendant immediately caused the following notice to be served upon the auctioneers:—

“Messrs. Southey & Son. We hereby give you notice, and require you, not to part with the proceeds of the sale of the stock in trade, goods, chattels, and effects of Henry John Blackham, of No. 163, Union Street, Southwark, leather-seller, which have been lately sold by you by public auction on the premises; the said Henry John *Blackham *having committed an act of bankruptcy*. Dated, this 27th of June, 1844. [*615

(Signed) “DIMMOCK & BURBEY,
12, *Size Lane*,

Solicitors for Mr. Edward Pugh, a creditor of the said H. J. Blackham.”

In consequence of this notice, Southey & Son refused to pay over to the plaintiff the proceeds of the sale. On the 29th of June, the defendant withdrew the notice; but the auctioneers declined to act upon such withdrawal, unless the defendant's solicitors would assure them that the notice that the plaintiff had committed an act of bankruptcy had been given under a misapprehension. This the defendant's solicitors refused to do; and the proceeds of the sale were not paid over to the plaintiff until after the trial of this cause.

A witness was called on the part of the defendant, to prove an admission by the plaintiff that he had committed an act of bankruptcy, by absentsing himself from his place of business for the purpose of delaying his creditors. The attempt was held to have failed.

It was then insisted on the defendant's behalf, that the notice to Southey & Son was a privileged communication, inasmuch as it was a statement made, *bonâ fide*, and in the full belief of its truth, by a person having an interest in the subject-matter, and to a person interested in receiving the information; and, consequently, that the action was not maintainable without proof of *express malice*.

The learned baron told the jury that they must at all events find for the plaintiff on the second issue, the period of credit not having expired at the time the notice was served upon the auctioneers; that the communication was not privileged, though made *bonâ fide* and in the belief of its truth, and therefore that the plaintiff was also entitled to a verdict on the *616] first issue; and that he was entitled likewise to a verdict upon the *third issue, unless they thought the defendant had made out his third plea.(a)

The jury returned a verdict for the plaintiff, damages 50*l*.

Shee, Serjt., in Michaelmas term, 1844, on the part of the defendant, obtained a rule nisi for a new trial, on the ground of misdirection. He cited *M. Dougall v. Claridge*, 1 Campb. 267; *Fairman v. Ives*, 5 B. & Ald. 642, 1 D. & R. 252, 1 Chitt. R. 85; *Woodward v. Lander*, 6 C. & P. 548, and *Shipley v. Todhunter*, 7 C. & P. 680.

Sir T. Wilde, and Channell, Serjts., (with whom was *Bramwell*,) showed cause in Easter term, 1845.(b) The notice in question, which falsely imputed to the plaintiff the commission of an act of bankruptcy, was not a privileged communication. The charge was wholly gratuitous and unfounded, and was of a character most offensive and injurious. Is this within the rule laid down by PARKE, B., in *Toogood v. Spyring*, 1 C., M. & R. 193, 4 Tyrwh. 582, a communication "fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned?" Here, the defendant had not the sort of interest that will afford an excuse for a libel. In *M. Dougall v. Claridge*, 1 Campb. 267, the letter was held to be a privileged communication, because written by a party to the suit. So, in *Dunman v. Bigg*, 1 Campb. 269, n., the communication was held to be privileged because made by a creditor, to the surety of his *617] debtor, in a manner in which both were interested. **Shipley v.*

Todhunter, 7 C. & P. 680, is also an authority to show that a man may lawfully communicate to another any information he is possessed of in a matter in which they have a mutual interest, though such communication may convey reflections injurious to a third party. *Fairman v. Ives* and *Woodward v. Lander* have no application: they were cases of complaints *bonâ fide* made to public offices, for the purpose of obtaining redress of grievances. Here, the real question is, whether this was a communication made by the defendant in a matter in which his own interest was concerned, and made in the legitimate conduct of his own affairs. A man must not so conduct his own affairs as altogether to overlook his neighbour's rights. [ERLE, J. Would the defendant have been justified, if it had appeared that he had reasonable ground for supposing that the plain-

(a) Vide *suprà*, 613, n. (a).

(b) The argument upon this rule—which had been postponed until after the second argument of *Coxhead v. Richards*, *antè*, p. 569,—took place before Tindal, C. J., and Coltman, Cresswell, and Erle, J.

tiff had committed an act of bankruptcy?] Clearly not. But here the credit had not expired; the defendant must therefore have known that, as far as he was concerned, no act of bankruptcy could have been committed.

Shee, Serjt., (with whom was *Bovill*.) in support of the rule. The learned judge ought to have told the jury that the circumstances under which the notice was given, afforded a legal justification. The case clearly falls within the principle of those authorities in which it has been held, that a communication *bonâ fide* made for the purpose of obtaining redress, to one who may fairly be supposed to have the means of affording it, is protected. [CRESSWELL, J. *Coxhead v. Richards*, ante, p. 569, turned upon the existence of a supposed moral duty on the part of the recipient of information, to convey it to one who has an interest in being possessed of it: this case turns on the ground of *interest*; there is no moral duty.] Perhaps, *the defendant owed a moral duty to the auctioneers: [618 they had an interest in the matter. [CRESSWELL, J. They could have had no interest, if they had had no notice.] At all events, the defendant had such an interest in the matter, as to excuse any little excess of zeal on his part. In *Fairman v. Ives*, the letter was addressed to one who had no means of giving the redress that was sought. The present case falls precisely within the rule laid down by PARKE, B., in *Toogood v. Spyring*: and that rule is quite consistent with what is said by Lord DENMAN, C. J., in the subsequent case of *Tuson v. Evans*, 12 A. & E. 733: "Any one, in the transaction of business with another, has a right to use language, *bonâ fide*, which is relevant to that business, and which a due regard to his own interest makes necessary, even if it should directly, or by its consequences, be injurious or painful to another; and this is the principle on which privileged communication rests." Here, the communication was made in the *bonâ fide* belief, that an act of bankruptcy had been committed; and in a manner as little injurious or offensive as the circumstances would admit of. Even if the credit had not expired, the defendant,—assuming an act of bankruptcy to have been committed,—would, for this purpose, have had all the rights of a present creditor.

Cur. adv. vult.

TINDAL, C. J. This was an action upon the case for a libel upon the plaintiff in the way of his trade.

The declaration stated that the plaintiff had sold his stock in trade by auction, and that the proceeds were then in the hands of his auctioneers; and that he, the plaintiff, had purchased of the defendant certain goods to the amount of 62*l.* and upwards, upon a credit which had not then expired; and that the defendant falsely *and maliciously published the libel complained of, in the form of a notice, which he [619 procured his attorneys to send to his said auctioneers; by which notice they were desired not to part with the proceeds of the sale in their hands, the plaintiff having committed an act of bankruptcy.

Besides the general issue, there was a second plea, alleging that the goods were not bought upon a credit that had not expired at the time of the libel, and a third plea alleging that the plaintiff had committed an act of bankruptcy, both of which were found for the plaintiff; but upon neither of which any question now arises. Upon the general issue, the jury returned a verdict for the plaintiff, by the direction of the learned judge, who told the jury this was not a case in which the defendant was justified under the general issue, although he made the communication *bona fide*, and believing it to be true at the time. And whether this direction of the learned judge was right or not, is the question raised for our consideration, on a motion for a new trial.

This action, it is to be observed, is not an action against the defendant for maliciously, and without any reasonable or probable cause, directing his attorneys to give the notice to the auctioneers; under which form of action, the defendant would have been held liable in damages to the plaintiff, if, without any reasonable cause, but from over-precipitation, or unfounded suspicion, he had caused such notice to be given. But this is an action for a false and malicious *libel*. And the question is, whether such action is maintainable where there is altogether the absence of any malice in fact, and where the defendant, having a personal interest in preventing the money from being paid over to the plaintiff, did, with perfect good faith, and in the full belief that the plaintiff had committed an act of bankruptcy, direct his attorneys to give such notice to the auctioneers.

*620] If the defendant had issued a fiat in bankruptcy against the plaintiff, in pursuance of his notice, (a) it is perfectly clear that the plaintiff could not have sued him in an action of slander or for a libel, but must have brought his action for maliciously, and without any reasonable or probable cause, issuing the fiat. And it does seem singular that a previous notice, (b) which was absolutely necessary to protect the interest of the creditors of the plaintiff under such fiat, should be supposed to fall under a different construction of law from the issuing of the fiat itself. It does, indeed, seem to be part and parcel of the same transaction. (c)

But, in any point of view, this case appears to me to fall within the range of that principle by which a communication made by a person immediately concerned in interest, in the subject-matter to which it relates, for the purpose of protecting his own interest, in the full belief that the communication is true, and without any malicious motive, is held to be excused from responsibility in an action for a libel. *Delaney v. Jones*, *M. Dougall v. Claridge*, and *Toogood v. Spyring*, appear to me to be authorities which fully support this proposition. In the last of these cases, the judgment includes—under those cases in which the law considers the

(a) The notice under the statute.

(b) The alleged libel.

(c) *Secus*, where no fiat.

occasion to prevent the inference of malice which it draws from unauthorized communications injurious to the character of another—such communications as are fairly and honestly made “by a person in the conduct of his own affairs, in matters where his interest is concerned.”

It appears to me that the present case falls strictly within the principle so laid down, in the soundness and propriety of which principle I entirely agree; and, consequently, that the direction of the learned judge was incorrect, and that the rule should be made absolute.

*COLTMAN, J. The question of law which arises upon the facts reported by my brother PARKE in this case is, whether, assuming that the defendant acted *bonâ fide*, and without malice, the occasion was such as justified him in making the imputation he has done on the plaintiff. [*621]

For the general rule which, in my humble opinion, ought to govern cases of this sort, I would refer to the case of *Coxhead v. Richards*, *antè*, p. 569, without repeating what I there said. (a) In reference to the particular circumstances of the present case, I would remark that the defendant had the most direct interest in the matter with reference to which the statement complained of was made. There was, indeed, no debt then payable to him; but it was on the point of becoming so. He had a direct interest in preventing the money, then in the hands of the auctioneers, from being paid over into the hands of the bankrupt; as it was a fund out of which he might hope to receive a dividend, if matters should come to a bankruptcy. It was material to the defendant's interest,—at least, he might reasonably suppose it to be material to his interest,—that he should give notice of an act of bankruptcy having been committed, (if one had been committed,) in order to prevent the auctioneers from being discharged in case they should pay over the money to the bankrupt before the issuing of a fiat. Under these circumstances, it appears to me that there was a sufficient justification for his imputing bankruptcy to the plaintiff, if he *bonâ fide* believed that an act of bankruptcy had been committed: and I am not prepared to say that there were not such reasonable grounds of suspicion as might warrant a jury in thinking, that, in making the imputation in question, he acted *bonâ fide* and without malice. I think, *therefore, though with that deference which I must feel for those whose opinion is adverse to mine, that the question ought to have been left to the jury, and that there should be a new trial. [*622]

CRESSWELL, J. This was an action for a libel contained in a letter written by the defendant to a third person, in which he stated that the plaintiff, a currier, had committed an act of bankruptcy. Plea, not guilty, amongst others. At the trial, before my brother PARKE, at the Summer assizes, 1844, for Surrey, it was contended for the defendant that the alleged libel was a privileged communication, having been written on a lawful occasion, without any malicious motive. The learned judge ruled

that it was not a privileged communication, and the plaintiff obtained a verdict. In Michaelmas term a rule nisi for a new trial was granted, which was argued in Easter term; and it has stood over for consideration; and I now have the misfortune to stand alone in the opinion that I have formed.

The facts upon which the question depends are very simple. The defendant had sold goods to the plaintiff, the time of payment for which had not arrived, but was drawing near. The plaintiff had sold off great part of his goods by auction, and the auctioneers had the proceeds in their hands, when the defendant wrote to them, and gave them notice that the plaintiff had committed an act of bankruptcy, and desired them not to pay over the money to the plaintiff. It was argued for the defendant that the publication of this letter to the auctioneers was privileged, because it was written by the defendant in good faith, and without malice, in the conduct of his own affairs, in a matter where his interest was concerned, so as to be within the description of privileged communications given by PARKE, B., in *Toogood v. Spyring*. On the other hand, it was contended *623] that this letter was not written by the defendant in the conduct of his own affairs, nor was his interest concerned, within the meaning to be ascribed to those words as used in *Toogood v. Spyring*, so as to constitute a lawful occasion for publishing defamatory matter: and I am of opinion that the occasion in question was not a lawful occasion, and that the learned judge was right in telling the jury, that, on the plea of the general issue, the plaintiff was entitled to a verdict.

In determining this question, the cases depending upon the discharge of some legal or moral duty, may be laid out of consideration; for the defendant, in giving notice to the auctioneers, was acting solely for his own benefit; and, if that which he did was lawful, it must be so because it was an act done in the conduct of his own affairs in a matter where his interest was concerned.

The cases bearing upon the point may be divided into two classes—one, where the communication has been made by a person having an interest in the very transaction to which it related, to another person also interested or employed in conducting it—the other, where a party, having sustained a grievance, or that which he thought a grievance, has addressed a complaint to a person whom he supposed capable of redressing it, and, in so doing, has used defamatory language. *McDougall v. Claridge*, 1 Campb. 267; *Wright v. Woodgate*, 2 C., M. & R. 573, 1 Tyrwh. & G. 12; *Spencer v. Amerton*, 1 M. & Rob. 470, and *Shipley v. Todhunter*, 7 C. & P. 680, belong to the former class: *Fairman v. Ives*, 5 B. & A. 642; *Woodward v. Lander*, 6 C. & P. 548; *Coward v. Wellington*, 7 C. & P. 531, to the latter.

In the present case, the defendant was not interested in the sale of the plaintiff's goods, nor was there any *624] connection between him and the auctioneers in the transaction; nor had the defendant, at the

time when the alleged libel was written, sustained any grievance, nor had any thing really occurred which he considered a grievance. The debt contracted by the plaintiff was not then payable; and, for any thing he knew, might be duly paid as soon as he had a right to demand it; and he might never have any interest at all in the proceeds of the goods that had been sold. Now, there is nothing in the language of the court, in deciding the case of *Fairman v. Ives*, tending to show that the result would have been the same had the defendant's letter been addressed to the secretary at war before the plaintiff's acceptances had been dishonoured. In *Woodward v. Lander*, the observations of the learned judge who tried the cause, were applied to the defamatory language used by the defendant in representing to the postmaster-general things that had really occurred, and commenting upon them. And in *Coward v. Wellington*, the letter complained of was written by the defendant in his own vindication against a charge of dishonesty. *Hargrave v. Le Breton*, 4 Burr. 2422, and *Pitt v. Donovan*, 1 M. & Sel. 639, can hardly be treated as authorities for our guidance in deciding this case. They were not actions for defamation, but for slander of title, which are governed by different principles. In neither case had the defendant published any thing defamatory of the plaintiff; but, claiming to be interested, had disputed the plaintiff's title to an estate which he was about to sell. A publication of such a nature is not an unauthorized publication which the law deems to be malicious; and, in order to maintain the action, it is necessary to prove *actual* malice, or, in Lord ELLENBOROUGH's words, "The jury must arrive at their conclusions through the medium of malice or no malice in the defendant."

"It appears to me, then, that the present case does not fall [*625 within any of the exceptions out of the general rule of law,—that a man must be responsible for publishing defamatory matter which he cannot prove to be true; and that the rule for a new trial ought to be discharged.

ERLE, J. In this case a rule nisi for a new trial has been obtained, on the ground of misdirection.

The action, as far as this rule is concerned, was for a libel in giving a notice that the plaintiff had committed an act of bankruptcy. The evidence showed that the defendant had sold goods to the plaintiff upon credit; and, upon the day before the credit expired, the defendant discovered that the plaintiff had apparently sold off all his stock in trade, by auction, and had apparently quitted his place of business without leaving his address. He, therefore, believed that the plaintiff had committed an act of bankruptcy, though in fact he had not.

If there *had* been an act of bankruptcy, the defendant and the other creditors would have had a right to the proceeds of the sale in the hands of the auctioneers; and a notice to them was essential to prevent this right from being defeated. Accordingly, the notice, which was the subject of the action, was given.

The learned judge was of opinion, that these facts afforded no evidence to rebut the presumption of malice from the publication of libellous matter, and therefore directed a verdict for the plaintiff. The correctness of this direction is now to be considered.

The defendant contends that he is within that class of the cases where the presumption of malice is rebutted by the occasion, which is grounded on consideration of the private interest of the party publishing: and I *626] think that he is, because he believed, with reasonable *cause, that the communication was required in prudence to protect his rights.

There are numerous decisions that one kind of slander is justifiable, if made in asserting a claim of right, although the claim may be entirely without foundation in fact: *Gerard v. Dickenson*, 4 Co. Rep. 18; *Smith v. Spooner*, 3 Taunt. 246. And in *Pitt v. Donovan*, 1 M. & Sel. 639, it was decided, that if the defendant *bonâ fide* believed he had a claim to the plaintiff's land, he would be justified, although his belief was not only contrary to the fact, but also without grounds sufficient for a man of sense and experience.

Slander of title may be at the same time derogatory to the plaintiff personally, as in the assertion of the bastardy of an heir presumptive, by a younger brother, supposed in *Gerard v. Dickenson*, 4 Co. Rep. 17 a; but the justification is not affected thereby.

In the present case, the notice of the defendant appears to me to be, in substance, the assertion of a claim involving, of necessity, that which the plaintiff complains of as a libel, and therefore justified, if the jury found it was made in good faith, although the plaintiff was mistaken in fact.

In *Hargrave v. Le Breton*—where the plaintiff lost the sale of his estate at auction by a notice of the bankruptcy of the mortgagor, under whom he claimed, and which notice was partly true and partly not—the court appear to have decided that the defendant was justified, on the ground that he believed the communication requisite to protect the right of a creditor over the estate of a debtor subject to the bankrupt law, although he asserted that a docket had been made out, when in fact no docket had been made out, either then, or when the rule for a new trial was made absolute.

*627] In *Fairman v. Ives*, the principle of the decision was—that a creditor who makes a statement that would be otherwise libellous, is justified if the occasion of his making it be an honest endeavour to obtain redress against his debtor. If, in this case, it was doubtful whether there was sufficient ground for making the assertion, or whether the publication in a degree exceeded what was strictly necessary,(a) these were matters from which the jury might find malice.

(a) Vide *Robertson v. M'Dougall*, 4 Bingh. 670, 1 Moo. & P. 692, 3 Carr. & P. 259, where such excess was held to constitute legal malice, independently of any inference of malice *in fact*, to be drawn from that excess by the jury.

The objection that the plaintiff's debt was not payable when the notice was given, is answered ; because, upon the supposition of a bankruptcy,—on which the defendant acted,—he had all the rights of a *present* creditor. And the objection that no act of bankruptcy existed in fact, is answered ; because, in many of the cases of protection from the occasion, the defendant has been shown to have acted upon a mistake, but has been nevertheless held to be justified, if he acted on an honest belief.

The rule for a new trial, therefore, should, I think, be made absolute.

Rule absolute.(a)

(a) A second trial took place before Lord Denman, C. J., at the summer assizes for Surrey, in 1846, when that learned judge, feeling himself bound by the opinion of the majority of this court, directed the jury accordingly, at the same time intimating that he entertained considerable doubt as to the soundness of the direction. The jury returned a verdict for the defendant.

A bill of exceptions was tendered on the part of the plaintiff, and the errors assigned thereon now (in January, 1847) stand for argument in the Exchequer Chamber.

*BENNETT v. DEACON. May 5.

[*628

Quære, whether a caution *bonâ fide* given to a tradesman, without any inquiry on his part, not to trust another, falls within the exception as to privileged communications.

Held, by Tindal, C. J., and Erle, J., that it does.

Held, by Coltman and Cresswell, Js., that it does not.

CASE, for slander of the plaintiff in his trade.

The declaration stated that the plaintiff, before and at the time of the committing by the defendant of the grievances thereafter mentioned, used, exercised, and carried on, and still did use, exercise, and carry on the trade of a wheelwright, and had always conducted the same with great punctuality of dealing, well and faithfully observing and keeping his engagements and paying his just debts, and that the plaintiff was not at the time of the speaking and publishing of the several false, scandalous, and malicious words thereafter mentioned, nor at any time since, in insolvent circumstances or unable to pay his just debts ; and, by reason of the premises, the plaintiff, until the speaking of such slanderous words, was deservedly held in great esteem and credit by his neighbours and others, and particularly by those with whom he had any dealings in his said trade, and enjoyed great reputation therein ; whereby the plaintiff daily acquired divers great gains and profits in his said trade, to the support and maintenance of himself and his family, and the great increase of his fortune ; and that the plaintiff, before the committing of the said grievances, had treated with one William Clark, in the way of his, the plaintiff's, said trade, for the purchase by the plaintiff from Clark of a certain large quantity, to wit, 500 tons, of timber, at and for a certain price or sum of money to be paid by the plaintiff to Clark in that behalf : yet the defendant, well knowing the premises, but contriving and wrongfully and ma-

liciously intending to injure and destroy the good name and reputation of the plaintiff in his *said trade, and to cause him to be regarded as
 *629] a person of no credit, worth, or substance, and in insolvent circumstances in his said trade, and unable to pay his just debts, and, thereby to injure and prejudice him in his said trade and business, during the time the plaintiff carried on his said trade as aforesaid, and before the commencement of this suit, to wit, on the 9th of October, 1845, in a certain discourse which the defendant then had with Clark, of and concerning the plaintiff, and of and concerning him in the way of his aforesaid trade, and of and concerning the treaty for the said timber which Clark had so treated with the plaintiff to sell to the plaintiff as aforesaid, asked Clark a question in the words following:—"Are you (meaning Clark) going to have ready money for it? (meaning the said timber); and then, in reply to the following answer of Clark thereto to the defendant, "I (meaning Clark) am going to have about half ready money, and the other at a month's credit, and shall draw it (meaning the said timber) down to Bennett's yard, to get it from the station, or I shall have to pay demurrage," the defendant spoke to and in the hearing of Clark, of and concerning the plaintiff, and of and concerning him in the ways of his aforesaid trade, and of and concerning the said treaty for the said timber which Clark had so treated with the plaintiff to sell to the plaintiff, the false, scandalous, malicious, and defamatory words following, that is to say:—"If you (meaning Clark) draw it (meaning the said timber) down to Bennett's (meaning the plaintiff's) yard, you'll lose it; for, he (meaning the plaintiff) owes me (meaning the defendant) about 25*l.*, and I (meaning the defendant) am going to arrest him (meaning the plaintiff) next week, for my money, and the timber (meaning the said timber) will help to pay my debt;" thereby meaning that the plaintiff was in insolvent circumstances in his said trade, and unable to pay his just
 *630] debts; that, by means of the committing of such grievances by the defendant, the plaintiff had been, and was, greatly injured in his said good name, credit, and reputation in his said trade, and brought into public scandal and disgrace, and had been shunned and avoided by divers persons, and otherwise injured; and also the plaintiff, by reason of the premises, was prevented from completing the said treaty with Clark, for the purchase of the said timber, and Clark, by reason of the premises, wholly refused to treat further with the plaintiff in respect thereof, &c.

The defendant pleaded not guilty; whereupon issue was joined.

The cause was tried before COLTMAN, J., at the second sitting in London in Hilary term, 1846. The facts were these:—The plaintiff is a wheelwright, carrying on business in the Wandsworth Road, near the terminus of the South-Western Railway. The defendant is a timber-dealer and builder in the same neighbourhood. On the 8th of October last, one William Clark, a timber-dealer who resided at Chiddingfold, in Surrey, having brought up a quantity of ash timber by the railway, entered

into a treaty for the sale of it to the plaintiff on the 9th of October. Before the sale had been finally agreed upon, the defendant, meeting Clark in the road, inquired of him if he had sold his timber yet; to which Clark answered—"I believe I have: Bennett is going to have it." The defendant then asked, "Are you going to have ready money for it?" To this Clark answered, "I am going to have half ready money, and the other at a month's credit;" adding that he was going to get the timber drawn from the railway to Bennett's yard, in order to avoid demurrage. The defendant then remarked: "If you draw it down to Bennett's yard, you'll lose it; for, he owes me about 25*l.*, and I am going to arrest him next week for my money, *and your timber will help to pay my debt." In consequence of this statement Clark declined to sell the timber in question to the plaintiff. It appeared that the plaintiff was really indebted to the defendant to the amount of about 23*l.*; but it did not appear that the account had been sent in or the money demanded. [*631]

On the part of the defendant it was submitted that the circumstances under which the words were spoken, rendered the communication privileged, in the absence of any thing to warrant the jury in inferring that the defendant was influenced by any malicious or sinister motive.

The learned judge, however, thought that, though the communication might have been privileged if *bonâ fide* made in answer to inquiries addressed to the defendant as to the credit and circumstances of the plaintiff, yet, inasmuch as he had *volunteered* the information, the case did not fall within the exception to the general rule.

The jury returned a verdict for the plaintiff, damages 40*s.*

Byles, Serjt., in the course of the term, obtained a rule nisi for a new trial, on the ground of misdirection. He cited *Edmondson v. Stevenson*, Bull. N. P. 8; *Bromage v. Prosser*, 5 B. & C. 247, 6 D. & R. 296; the judgment of BAYLEY, J., in *Pattison v. Jones*, 8 B. & C. 584, 3 M. & R. 101, and *Cozhead v. Richards*, antè, p. 569, *Blackham v. Pugh*, antè, p. 611.

Talfourd, Serjt., now showed cause. The direction of the learned judge was clearly right: it was precisely in accordance with that of Lord ABINGER, C. B., in *King v. Watts*, 8 C. & P. 615, which has never been objected to. The *circumstance of the defendant being a volunteer has always been considered to have an important bearing upon the question of privilege. This appears from the observation of Lord LYNDBURST in *Brooks v. Blanshard*, 3 Tyrwh. 849, that, "It is not merely because a communication is confidential that it is privileged, if it is volunteered by the party making it." All the authorities upon the subject having been so elaborately discussed and considered in the recent cases of *Cozhead v. Richards*, antè, p. 569, and *Blackham v. Pugh*, antè, 611, it is unnecessary to do more than refer to these cases. The communication cannot be privileged, without some evidence that the defendant *bonâ fide* believed the statement he made to be true. [*632]

Byles, Serjt., in support of the rule. The communication in question clearly was privileged; the defendant not being actuated by any malicious motive, but having given the information merely in kindness and friendship to Clark, who had an interest in the matter, even though the information was volunteered: *Edmondson v. Stevenson*, Bull. N. P. 8; *Hervey v. Dowson*, *ibid.*; *Wright v. Woodgate*, *antè*, 578; *Toogood v. Spyryng*, 1 C., M. & R. 181, 4 Tyrwh. 582; and it is not necessary to his justification that the party making the communication should likewise be interested: *Peacock v. Reynall*, Brownl. & G. 151. [CRESSWELL, J. We are all agreed as to the correctness of the rule laid down by PARKE, B., in *Toogood v. Spyryng*.]

TINDAL, C. J. I am unable to distinguish the case in principle from *Coxhead v. Richards*; and I see no reason at present to alter the opinion I there expressed. It seems to me that the communication in question, *633] *having been made *bonâ fide* to Clark in the ordinary course of, and in relation to, his business, was privileged, and that the rule should be made absolute.

COLTMAN, J. I cannot actede to the argument of my brother *Byles*, that this was, under the circumstances, a privileged communication. I do not think that is the fair result of the authorities. I adhere to the opinion I expressed in *Coxhead v. Richards*, and in *Blackham v. Pugh*, *antè*, p. 611, and, therefore, it appears to me that the present rule ought to be discharged.

CRESSWELL, J. Nothing having since occurred to induce me to alter the opinion I expressed in the two cases referred to by my brother COLTMAN; and, conceiving the present case to fall within the same general principle, I think the rule should be discharged.

ERLE, J. I think this was entirely a matter for the jury: if they were satisfied that the communication was made *bonâ fide* and without malice,^(a) it was their duty to find for the defendant.

The court being thus equally divided in opinion, the rule fell to the ground, and the plaintiff retained his verdict.^(b)

(a) The rule here laid down would extend to every defamatory publication,—however unreasonable in itself and injurious to the party defamed,—the same degree of protection that was given in *Pitt v. Donovan*, 1 M. & Selw. 639; *Smith v. Spooner*, 3 Taunt. 246, to slander of title.

(b) The opinion of each of the learned judges in this case was the same as that pronounced by them respectively in *Corhead v. Richards*: the result to the parties was directly the reverse, the defaming party having succeeded in *Corhead v. Richards*,—in *Bennett v. Deacon*, (as also in a case similarly circumstanced, of *Prowse v. Wilcox*, 3 Mod. 161,) the party defamed.

*CHAPMAN and Another v. SUTTON. Jan. 21. [*634

A declaration by A. against B., upon a guarantee stated, that, in consideration of advances already made by A., and that A. would from time to time make advances to C., B. promised to repay A. the last-mentioned advances. The consideration on the face of the guarantee was—"in consideration of advances made and to be made by A., or by any other persons of whom A.'s firm might, from time to time, consist;"—*Held*, a variance.^(a)

A guarantee was given in these terms:—"In consideration of advances made and to be made by A. and B., or by any other persons of whom their firm may, from time to time, consist, in the way of loan, &c., we jointly and severally hereby guaranty to A. and B. the re-payment of the said advances, and to indemnify them against any loss by reason of such advances; our liability not to exceed 1000*l.*; this guarantee to be a continuing guarantee, and to be a security to A. and B. to the extent of 1000*l.* as aforesaid, for the whole of any balance which may from time to time, or at any time, become due to A. and B., or to the persons for the time being constituting the firm:"—*Held*, that this instrument disclosed a sufficient consideration for the defendant's promise, though there had been no change in the firm.

THE following case was, under an order of CRESSWELL, J., stated for the opinion of the court:—

The declaration stated, that, before and at the time of the making of the promise of the defendant as thereafter mentioned, and from thence until the commencement of the action, the plaintiffs exercised and carried on the trade of bankers in co-partnership, and before and at the time of the making of the promise of the defendants, the plaintiffs had advanced to one Fielding divers sums of money amounting to 2685*l.* 10*s.* 10*d.*, and Fielding was then indebted to the plaintiffs on the account thereof; that, thereupon, on the 7th of August, 1838, in consideration of the said advances so made as aforesaid, and that the plaintiffs, or any other persons of whom the said firm might, from time to time, *consist,^(b) would [*635 [from time to time^(c)] make advances to Fielding of moneys in the way of loan, payments, discount, or otherwise, the defendant and one Howland jointly and severally guarantied, and then promised to the plaintiffs the repayment of, the said [last-mentioned^(c)] advances, and to indemnify them against any loss by reason of such advances, provided that the liability of Howland and the defendant was not to exceed 1000*l.*; that the defendant and Howland, then, also, for the consideration aforesaid, promised the plaintiffs that the defendant's said guarantee and promise should be a continuing guarantee, and a security to the plaintiffs to the extent of 1000*l.* as aforesaid, for the whole of any balance which might,

(a) Rejecting the nugatory portion of the alleged consideration, consisting of advances already made to C. without any precedent request on the part of B., the only consideration for the guarantee would be the advances to be made either by A. or by the firm. *Quere*, whether this springing consideration is not a divisible consideration, the advances which might be made by A. constituting the sole consideration for the guarantee of the amount of those advances, and the advances which might be made by the firm, being regarded as the sole consideration of the promise to guaranty the amount of the advances to be made by the firm. It would have been otherwise if there had been any *engagement* on the part of A., or of the firm, to make advances to C.; as in that case the entire engagement would have formed the consideration, or part of the consideration, of the promise to guaranty the advances to be made by either.

(b) The words in *Italics* were inserted on the amendment.

(c) The words between brackets were struck out on the amendment.

from time to time, or at any time, become due to the plaintiffs or to the persons for the time being [carrying on the said trade(a)] *constituting the said firm*; (b) that the plaintiffs, confiding in the said promise of the defendant, did afterwards, *and whilst they were and constituted the said firm*, (b) to wit, on the 8th of August, 1838, and on divers other days and times afterwards, make to Fielding, at his request, divers advances of moneys, in the way of loan, payments, discount, and otherwise, amounting to 10,000*l.*; and that, although the time for the repayment of the said advances had elapsed before the commencement of the suit, and, although Fielding *636] was afterwards, and before the *commencement of the suit, to wit, on the 1st of July, 1844, requested by the plaintiffs to pay them the same; but that he had not paid the plaintiffs the same, or any part thereof; and that thereof the defendant and Howland afterwards, to wit, on the day and year last aforesaid, had notice; yet the defendant and Howland had not, nor had either of them, paid to the plaintiffs, or either of them, the sum of 1000*l.*, parcel of the said advances so due and owing as aforesaid, or any part thereof; and that the said sum of 1000*l.* still remained wholly due and unpaid to the plaintiffs.

Plea, non assumpsit.

For some time previous to, and on and since the 7th of August, 1838, the plaintiffs carried on business as bankers at Aylesbury. For some time previous to the said 7th of August, 1838, George Fielding had been a customer of the bank; and on that day, at the time the guarantee hereinafter mentioned was given, the state of the account between Fielding and the plaintiffs was as follows; viz., amount of advances made to Fielding, 20,507*l.* 10*s.* 5*d.*; amount repaid, 18,821*l.* 19*s.* 7*d.*; making the balance then due to the plaintiffs by Fielding, 1685*l.* 10*s.* 10*d.*

On the said 7th of August, 1838, the defendant and Robert Howland gave the plaintiffs a guarantee in writing, signed by Howland and the defendant, viz.—

“In consideration of advances *made and to be made by Messrs. Thomas Chapman, and Thomas Sands Chapman, of Aylesbury, bankers, or by any other persons of whom their firm may from time to time consist*, in the way of loan, payments, discount, or otherwise, to George Fielding, of Thame, in the county of Oxford, ironmonger, we, jointly and severally, hereby guaranty to the said Thomas Chapman and Thomas Sands Chapman *637] the repayment of the *said* advances, and to indemnify *them against any loss by reason of such advances; our liability not to exceed the sum of 1000*l.* This guarantee to be a continuing guarantee, and to be a security to the said Thomas Chapman and Thomas Sands Chapman, to the extent of 1000*l.* as aforesaid, for the whole of any balance which may from time to time, or at any time, become due to the said Thomas Chapman and Thomas Sands Chapman, or to the persons

(a) The words between brackets were struck out on the amendment.

(b) The words in *Italics* were inserted on the amendment.

for the time being constituting the firm of the said banking-house.
Dated, &c.

“ Witness,

(Signed) “ ROBERT HOWLAND.

“ RICHARD HOWLAND.

“ T. L. SUTTON.”

On the same day, the plaintiffs advanced to Fielding 1000*l*.

After the day on which the said guarantee was given, the plaintiffs advanced to Fielding various other sums, of which there remained due to the plaintiffs before the commencement of the suit, and still remained due, a balance far exceeding 1000*l*.

The question for the opinion of the court is, whether the plaintiffs are entitled to recover. If so, the plea is to be withdrawn, and they are to sign judgment by confession, for 1000*l*. and costs. If not, a judgment of *non-pros.* is to be entered.

The court to be at liberty to amend any part of the pleadings as they may think proper.

Jan. 16. *Channell*, Serjt., (with whom was *Willes*,) for the plaintiffs. Two questions arise in this case—first, whether the declaration discloses a contract binding on the defendant *ex facie*—secondly, whether there is any variance between the declaration and the document by which it is to be supported.

The declaration states that the plaintiffs had advanced moneys to Fielding, and that, in consideration of the *advances so made as aforesaid, and that the plaintiffs would from time to time make [*638 advances to Fielding, the defendant and Howland guarantied the repayment of the *last-mentioned* advances, to the extent of 1000*l*., and that the guarantee was to cover any balance that might at any time be due to the plaintiffs, or the persons for the time being carrying on the said trade or business—pointing to something precedent as well as to a consideration to arise in future, viz., advances to be from time to time made. The advances last-mentioned are advances made subsequently to the date of the guarantee; and if the word *such* be taken to relate to those advances, the consideration is compounded in part of previous advances and in part of advances subsequently made, but the promise is a promise to pay the subsequent advances only; and, therefore, the difficulty that has presented itself in some of the cases, does not arise here. But, even if the words of reference be taken to apply to *all* the advances, and the promise, in like manner, to apply to both classes of advances, still the declaration will be good. In *Raikes v. Todd*, 8 Ad. & E. 846, 1 P. & D. 138, which will probably be relied on for the defendant, it was held, that, assuming there was a good consideration for the defendant's promise, it was not stated in the declaration. [CRESSWELL, J. Was not the ground of the decision there, that the guarantee was uncertain?] Some of the judges were of that opinion; others, that the consideration was not truly stated. *Johnston v. Nicholls*, ante, vol. i. p. 251, goes the full length of deciding

this case. There, B. gave to A. the following guarantee: "As you are about to enter upon transactions in business with C., with whom you have already had dealings, in the course of which C. may from time to time become largely indebted to you, in consideration of your doing so, *639] I *hereby agree to be responsible to you for, and guarantee to you the payment of any sums of money which C. now is, or at any time may be, indebted to you, so that I am not called upon to pay more than the sum of 2000*l*." There had been considerable dealings between A. and C. prior to the date of the guarantee, consisting of loans of money, payments made for, and goods supplied to C. by A., the credit upon which had not then expired, and those dealings had been, to a small extent, since continued. And this court held that the guarantee disclosed a sufficient consideration for the payment as well of the past as of the future debt. The question is, whether there is any consideration at all moving from the plaintiff to the defendant or to a third person. [MAULE, J. Some executory consideration.] So soon as advances are made upon the faith of it, the guarantee attaches: *Kennaway v. Treleavan*, 5 M. & W. 498; *Fishmongers' Company v. Robertson*, 5 M. & G. 131, 6 Scott, N. R. 56, antè, vol. i. p. 60. [CRESSWELL, J. *Haigh v. Brooks*, 10 Ad. & E. 309, 4 P. & D. 288, is a stronger case.] In this case there clearly is *some* consideration.

Then, is there any variance between the guarantee set out in the case and the statement of it on the record? The plaintiffs are the persons to whom the guarantee was given. It will be contended, on the other side, that the consideration in part consists of advances to be possibly made by a firm consisting of others than the now plaintiffs. The contract, however, is described according to its legal effect. No new person is introduced. [TINDAL, C. J. It will be contended that the guarantee is larger than is set out on the record.] The declaration truly states the consideration for the promise to the now plaintiffs. [MAULE, J. In averring performance, *640] it is enough to state that which *has been done: but is not the consideration entire, and are you not bound to state it truly? The statement of the consideration in this declaration is—"in consideration of advances so made (i. e. made *by the plaintiffs*) as aforesaid, and that *the plaintiffs* would from time to time make advances" to the customer: whereas the contract is, "in consideration of advances made and to be made *by the plaintiffs*, or by *any other persons* of whom their firm might from time to time consist." The consideration should have been stated in the terms of the instrument.] If the court entertain a strong opinion on the point, they will permit the plaintiffs to amend, under the power for that purpose reserved in the case.

Sir T. Wilde, Serjt., (with whom was *Crompton*,) for the defendant. The promise is, to indemnify the plaintiffs and to repay them, and *them only*, any balance that might be due, compounded of advances already made, and of future advances to be made either by *the plaintiffs* or by the

persons for the time being constituting the firm. In the declaration the word *such* refers to future advances only, whereas in the guarantee it applies to past advances as well as future. [MAULE, J. There is a variance in the promise, but not in the consideration.] It was no part of the consideration, that the plaintiffs should *from time to time* make advances: a single advance would entitle the plaintiffs to sue upon the guarantee. The consideration is entire. Part of it consists of advances by the new firm; and that is not stated. [MAULE, J. Can a promise to guaranty the price of a horse, and that of a cow, in consideration of a horse and cow sold and to be delivered, be declared upon as a guarantee of the price of the horse only? The meaning of the term "their firm" in the guarantee, is, a firm of which the plaintiff was a partner. This is not a case in which the court will exercise the power *reserved to them to amend, [*641 which means such amendments as are ordinarily made at nisi prius, and do not affect the merits. The defendant might, in the result, be called upon to pay the *old* debt. [MAULE, J. It is not contended that the *promise* is not to pay the balance of both.] The contract being void in part, by the statute of frauds,^(a) is void *in toto*; *Cooke v. Tombs*, 2 Anst. 420, 425. [TINDAL, C. J. The general rule is, that the consideration of the promise is entire, and must be so pleaded.] Here, the declaration omits to notice the probable change of firm. [TINDAL, C. J. I think the plaintiff shall be allowed to amend, by stating the consideration in the very words of the guarantee.]

Assuming that the objection to the mode of stating the consideration and promise is removed, the question is, whether the guarantee discloses a consideration applying to the old debt, and, if so, whether, supposing the promise to be invalid as to the old debt, it can be severed, and made a good promise as to new debts. The accounts contemplated by the guarantee consisted partly of by-gone advances, partly of advances to be made by the plaintiff, and partly of advances which might possibly be made by other persons under every variety of change which might take place in the firm. The balance due upon the whole of these blended accounts, might be less than the amount of any one of the classes of advances. Suppose the plaintiffs to take in a new partner, and advances to be subsequently made by the firm, and the balance of that account to be in favour of Fielding, that balance could not be excluded from the general account. The demand would be in respect of the balance of all the accounts taken together. *It is not now necessary to consider whether the promise is severable. The consideration must not be [*642 ambiguous. In *Raikes v. Todd*, 8 Ad. & E. 846, 1 P. & D. 138, Lord DENMAN, C. J., says: "There is certainly no necessity that the consideration should be co-extensive with the promise; but the real consideration, whatever

(a) The objection that the consideration alleged is a mere past consideration, unsupported by an antecedent request, appears to be an objection to the validity of the contract at common law.

it is, must be set out on the record. I entirely agree in the rule of construction recently laid down by TINDAL, C. J., (b) and my brother PATTESON; (c) and, on reading this guarantee with reference to that rule, I must confess myself unable to say what it was that induced the defendant to guaranty payment of the past advances. I should form a conjecture that both forbearance to sue for the past debt, and the making of further advances, constituted the consideration. That, however, is conjecture only; and the declaration alleges a different consideration, namely the further advances only. I think, therefore, the real consideration is not set out in the declaration, and the great uncertainty in which it is left entitles the defendant to have the rule made absolute." Here, there is no agreement for forbearance of the by-gone debt, and no obligation to make any future advances. There is no intelligible difference between the two cases. [TINDAL, C. J. Is any consideration expressed in *Raikes v. Todd*?] What is expressed here does not appear to carry the case further. There is nothing in this guarantee to bind the plaintiffs to make any advances. If in *Raikes v. Todd* the consideration was insufficient, it must be so in this case. Here, as there, we find no forbearance of a by-gone debt and no engagement to make advances. Nothing turns upon the statute of frauds, which has been alluded to. [CRESSWELL, J. Here, the agreement, whatever it is, is in *writing. COLTMAN, J. Your argument *643] goes to shake the authority of *Raikes v. Todd*. CRESSWELL, J. In that case I think my client lost his money by omitting to state the by-gone consideration. MAULE, J. If the amount of the new advances had been mentioned in the guarantee, there would have been no room for doubt. If it had been "in consideration of your having already made advances to A. B., and of your making him further advances to the amount of 1000*l.*, I promise to pay you any balance that may remain due to you on the old and on the new account, not exceeding 1000*l.*," though the plaintiff would not have been bound to make any advance, there can be no doubt but that would have been a very good promise. In *Raikes v. Todd*, future advances formed no part of the consideration; the defendant undertook to pay the old debt, whether any advances were made or not. Here, the plaintiffs could not declare upon the guarantee, without averring that they had made new advances to some amount. It is difficult to decide, without overruling *Raikes v. Todd*, that the new advances formed a sufficient consideration for the guarantee of the old debt. In *Raikes v. Todd* there was no such consideration. No advance was stipulated for. I speak of the instrument itself, not of the declaration.] The force of the learned judge's observations cannot be denied; and it must be admitted in this case it would have been necessary to allege that further advances had been made. Here, the amount of such advances is indefinite; but the adequacy of the consideration certainly cannot be ques

(a) *Haues v. Armstrong*, 1 N. C. 761, 1 Scott, 661.

(b) *James v. Williams*, 5 B. & Ad. 1109.

tioned. It is only in cases of covenants or agreements in restraint of trade that this can be done. [ERLE, J. It has recently been held in the Exchequer Chamber,^(a) that, even in those cases, the adequacy of the consideration is not a matter of law.]

**Per curiam.* We think that a judge at nisi prius would have made the amendment in the statement of the consideration and [644 the promise; and that by such amendment all objection would have been removed; and, therefore, that there must be judgment for the plaintiff.

Judgment for the plaintiff.

JOHN BOYD v. MOYLE. Jan. 24.

A declaration on a guarantee stated, that, in consideration that A., the plaintiff, would sell and deliver goods to C., B., the defendant, promised A. to guaranty to him the payment of the amount of, or the balance unpaid to A. for any goods then sold and delivered and to be thereafter sold and delivered to, and of any money lent, or to be lent to, or paid for C. by A., to the extent of 1000*l.*, and that A. should be at liberty, at any time thereafter, to call upon B. for the payment of the 1000*l.*, which might be applied by A. as A. thought proper, either in payment or part payment of any debt which might be due or have been due to A., and should not have been paid by C.

Held, on motion in arrest of judgment, that the declaration disclosed a sufficient consideration for the promise.

The guarantee was addressed, in the alternative, "to Messrs. A. & Co., or the person or persons for the time being carrying on the business" of that firm:—*Held*, no variance, no change in the firm having in fact taken place; or, that, if there were any variance, such variance would be amendable under the 3 & 4 W. 4, c. 42, s. 23.

The breach assigned in the declaration was, that the defendant had not *guaranteed* the payment or *paid*. The defendant pleaded, *inter alia*, that he had *guaranteed* the payment:—*Held*, that the words in the breach were not to be understood as used disjunctively, and that proof that the defendant had executed the instrument of guarantee, did not entitle him to a verdict on that issue.

ASSUMPSIT, on a guarantee.

The first count of the declaration stated, that, on the 15th of July, 1843, in consideration that the plaintiff, at the request of the defendant,^(b) would sell and deliver goods to one George James, of, &c., the defendant promised the plaintiff to guaranty to him the plaintiff, the due payment of the amount of, or the balance unpaid to the plaintiff for any goods *then sold and delivered*. *and to be *thereafter sold and delivered* to, and [645 of any money *lent* and to be *lent* to, or paid for James, by the plaintiff, to the extent of 1000*l.*, and that the plaintiff should be at liberty, at any time thereafter, to call upon him the defendant for the payment of the said sum of 1000*l.*, which might be applied by the plaintiff as the plaintiff thought proper, either in payment or part payment of any debt which might be due, or have been due, to him, the plaintiff, and not have been paid by James, after receiving any dividend or dividends or composition from his estate, or from him; that the plaintiff, confiding in the said

(a) *Quere* the case here referred to.

(b) The consideration being executory, the request was immaterial.

promise, did afterwards, to wit, on, &c., aforesaid, and on divers days and times since then and before the commencement of the suit, sell and deliver divers goods to James, at and for certain reasonable prices and sums of money to a large amount and value, amounting, in the whole, to a large sum of money, exceeding the said sum of 1000*l.*, to wit, to 2000*l.*, and did then also, at the request of James, lend to and pay for him divers other large sums of money, amounting together to a further large sum, exceeding 1000*l.*, to wit, to 2000*l.*; that, although the time for the payment to the plaintiff by James of the price of the said goods, and of the said sums of money so lent to, and paid for him as aforesaid, had long since, and before the commencement of the suit, elapsed, but that James had not (although often requested by the plaintiff so to do) paid the plaintiff the several sums of money so due and owing to him for and on account of the goods so sold and delivered, and the money so lent and paid by him, to and for James as aforesaid, or any part thereof, but had wholly neglected and refused so to do; that of all these premises the defendant afterwards, to wit, on the 1st of September, 1845, had notice; and that the said several sums of money, at the time of the commencement of the suit, were *646] and remained wholly due *and unpaid to him the plaintiff; yet that the defendant *had not guarantied to the plaintiff* the due payment of the amount so unpaid to the plaintiff as aforesaid, for the goods so by him sold and delivered, and of the sums of money by him lent and paid, to and for James as aforesaid, to the extent of 1000*l.*, nor had the defendant, although he was afterwards, to wit, on the day and year last aforesaid, requested by the plaintiff so to do, paid the said sum of 1000*l.*, or any part thereof, &c.

There was also a count upon an account stated.

The defendant pleaded—first, non assumpsit—secondly, as to so much of the first count as alleged that the plaintiff had sold and delivered divers goods to James, and lent to and paid for James divers sums of money, in manner and form as in the first count in that behalf was alleged, that the plaintiff did not sell or deliver any goods to James, nor did he lend or pay for James any sums of money, in manner and form as in the said first count was alleged—thirdly, to the first count, that, after the said sums which were the price of the said goods so sold and delivered by the plaintiff to James as in the said first count mentioned, became due and payable, and after the sums so lent to and paid for James by the plaintiff had become due and payable, and before the breach of promise of the defendant in the said first count mentioned, and before the commencement of the suit, to wit, on the 1st of September, 1845, the said sums which were the price of the said goods so sold and delivered as aforesaid, and the sums so lent to and paid for James as aforesaid, were paid, satisfied, and discharged by James to the plaintiff, and were not, nor was any part thereof, due or unpaid to the plaintiff, in manner and form as in the declaration was alleged—fourthly, as to so much of the first count as charged the

defendant with not having guarantied to the plaintiff the due payment of the amount so unpaid to the plaintiff *as in the first count in that behalf mentioned, the defendant said that he did, before the commencement of the suit, to wit, on the 5th of July, 1843, guaranty to the plaintiff the due payment of the amount so unpaid to the plaintiff as aforesaid for the last-mentioned goods and sums of money—fifthly, payment by James—sixthly, payment by the defendant. [*647]

The plaintiff joined issue on the first four pleas, and traversed the alleged payments. Issue on the traverses.

The cause was tried before CRESSWELL, J., at the last sitting in London in Michaelmas term last. The facts were these:—The plaintiff is the sole surviving partner of the firm of Boyd, Burnet, & Boyd. Prior to July, 1843, James, who carried on the business of a mercer and draper at Leamington Priors, in the county of Warwick, had had considerable dealings with Boyd & Co., and was then indebted to them to the amount of nearly 700*l*. On the fifth of that month, in order to induce them to continue the account, the defendant gave them the following guarantee:—

“To Messrs. Boyd, Burnet, & Boyd, or the person or persons, for the time being, carrying on the business of a warehouseman or warehousemen, now carried on at No. 44, Skinner Street, London.

“In consideration of your selling goods to Mr. George James of Leamington, draper, I do hereby agree to guaranty to you and each and every of you, the due payment of the amount of, or the balance unpaid to you for any goods sold and delivered, and to be hereafter sold and delivered, and of any money lent and to be lent to or paid for the said Mr. George James by you, to the extent of 1000*l*. And I do further agree that you shall be at liberty, at any time hereafter, to call upon me for the payment of the said sum of 1000*l*.; which may be applied by you as you think proper, *either in payment or part payment of any debt which may be due to you from the said Mr. George James, or to make up any deficiency, or towards any loss, or any debt which may be due or have been due to you, and not have been paid by him, after receiving any dividend or dividends or compositions from his estate or him. And I do further agree that you shall be at liberty, without giving notice to me, or obtaining my consent, to extend the usual time or times of payment or credit for any goods sold or to be sold to the said Mr. George James, and to renew or take from him, as you may think proper, any bills, notes, or securities for the payment of any debt due from him to you, or any part thereof; and also to receive or accept any composition from the said Mr. George James, in full for any debt, and to execute any release to him of the debt due from him, or any part thereof, and also to execute any assignment made by him in trust for his creditors. And I do further agree that this guarantee shall be a continuing guarantee, and shall be binding upon me for the payment of the said 1000*l*. at all events, [*648]

and under all circumstances, until you receive a notice in writing to the contrary. As witness my hand, this 5th day of July, 1843.

(Signed) "CHARLES MOYLE."

On the part of the defendant it was objected that there was a variance between the instrument produced in evidence and the statement of it in the declaration; the consideration on the face of the guarantee being the supply of goods and the advance of moneys by the then firm, or by the persons who might for the time being constitute the firm carrying on business under the names of Boyd, Burnet, & Boyd; whereas, the statement in the declaration was, in consideration of sales and advances *by the plaintiff*, alone: and it was insisted *that the consideration was indivisible and should have been set out entire.

The learned judge overruled the objection, and a verdict was found for the plaintiff, damages 1000*l*.

Manning, Serjt., in Michaelmas term last, obtained a rule nisi for a new trial, on the ground urged at the trial, and also to arrest the judgment, on the point that the declaration disclosed no consideration for the defendant's promise, inasmuch as the plaintiff was to be at liberty to apply the whole sum of 1000*l*. solely in discharge of a debt due for goods supplied, or money lent, *prior* to the date of the guarantee.

Channell and *Murphy*, Serjts., now showed cause. The first point was not so distinctly taken at the trial as to entitle the defendant to avail himself of it now. If it had been then urged that the consideration was defectively stated, the objection might have been cured by an amendment. The other objection might have been well founded, if no goods had been supplied or money advanced after the date of the guarantee. But when once the plaintiff's right to call upon the defendant attaches, the application of the money becomes immaterial.

Manning, Serjt., in support of the rule. The objection that is patent upon the record is, not that the consideration for the defendant's promise is inadequate, but that there is no consideration at all: for, by the terms of the guarantee as set out in the declaration, the plaintiff would be entitled to call upon the defendant for 1000*l*., provided so much were due to him from James, even though no goods should have been delivered, or any money lent to or advanced for him. [TINDAL, C. J. There might have been some ground *for the argument if no goods *had* been furnished or money lent to James subsequently to the date of the guarantee.]

TINDAL, C. J. It appears to me that the first count of the declaration in this case discloses a sufficient cause of action. It states, that, in consideration that the plaintiff, at the request of the defendant, would sell and deliver goods to James, the defendant promised and agreed with the plaintiff to guaranty to him the due payment of the balance unpaid to the plaintiff, for any goods then sold and delivered, and to be thereafter sold and delivered, to, and of any money lent and to be lent to or paid for James

by the plaintiff, to the extent of 1000*l.* The whole depends upon the future sale and delivery of goods and advance of money: and so far it is unexceptionable; for, the contract could not be enforced unless there had been a sale of goods, or an advance of money, to *some* amount. And though the clause which follows is susceptible of a double interpretation, I think, after it has been pleaded over to, we must ascribe to it a sense that will make the whole consistent. (a) The option given to the plaintiff, with respect to the application of the money received from the defendant under the guarantee, can only properly apply where there has been some new supply of goods, or some new advance of money, the expectation of which was the whole foundation for the contract.

The rest of the court concurred.

Manning, Serjt. The guarantee produced at the trial is in the form of a letter addressed "to Messrs. Boyd, Burnet, & Boyd," which may be taken to mean "the plaintiff only, his two partners having died before the transaction occurred, "or the person or persons, for the time being carrying on the business of a warehouseman or warehousemen, now carried on at No. 44, Skinner Street, London." The declaration omits this latter alternative, the consideration *stated* being confined to the supply of goods *by the plaintiff*. That is clearly a variance; and it is one which a judge would not allow to be amended. The supply of goods by the future firm may have been a very material ingredient in the inducement to the defendant to give the guarantee. Had the consideration been truly stated, the pleadings might have taken a different turn. [TINDAL, C. J. What possible difference could it have made to your defence at the trial?] The instrument must be so construed as to give effect, if possible, to every part of it. Where two words are used, one of which may be understood either in the same sense or in a different sense from the other, such word ought to be construed in the latter sense, that being the only sense in which it can have any operation. In assigning the breach, (b) the plaintiff treats the guarantying and the actual payment, as distinct matters. The issue upon the fourth plea, therefore, should have been found for the defendant, even though such finding might have led to a motion for judgment *non obstante veredicto*.

TINDAL, C. J. Of the remaining objections, the first is that there is a variance between the instrument produced in evidence and the statement of it upon the record. The alleged variance is this: the declaration states the consideration for the defendant's promise to be, the supply of goods to James by *the plaintiff*: whereas, the guarantee, when produced in evidence, is "found to be addressed, not to the plaintiff alone, or the firm he represents, but also to "the person or persons for the time being carrying on the business" then, and now, carried on by the plaintiff.

(a) Vide *antè*, vol. i. p. 787.

(b) Which states a refusal to pay on request, and an omission to guaranty *without alleging a request*.

I do not think it necessary to inquire whether or not this is a variance; for, it clearly is one that might have been amended at nisi prius, under the stat. 3 & 4 W. 4, c. 42, s. 23, if the judge had been asked to do so. (a) No new persons having been introduced into the firm between the date of the guarantee and the supply of goods under it, the defendant could not have been prejudiced in his defence by this mode of declaring. Everybody knows the purpose for which the alternative words are introduced.

The next question is, whether the defendant is entitled to a verdict on the fourth plea, which is a traverse of part of the breach, viz., that the defendant had not *guarantied* to the plaintiff the due payment of the debt of James. This objection depends upon the sense in which the word "guarantee" is to be understood. If it means merely the giving of the paper, then the defendant certainly has performed his engagement. But I think it is quite clear that that was not the meaning of the parties. When the defendant says, I guaranty the payment of the debt of A., he means, I warrant or undertake that he shall pay, or I will pay the debt for him. That is the meaning of the word in the instrument itself, and it must receive the same construction in the plea. In that sense the defendant *has* not guarantied; and therefore the verdict on the fourth plea is properly found for the plaintiff.

MAULE, J. The consideration might have been stated, and would have *653] been truly stated, in the *alternative*—the supply of goods, by the plaintiff, or by the person or persons who, for the time being, might compose the firm of Boyd, Burnet, & Boyd, and the promise, as a promise to pay the plaintiff or the members of the new firm; (b) the object of the parties being to treat the firm of Boyd, Burnet, & Boyd, in this respect, as a *quasi* corporation. And it is possible to conceive a state of circumstances where the omission so to state it would amount to a variance. But, at all events, it is a variance that would be cured by an amendment under the statute. (c) Whether a variance is amendable or not, does not depend upon the possibility of a state of circumstances existing, which, if it did exist, would make the misdescription of the contract material to the merits. Here, it did appear, affirmatively, that all the supply of goods and advances of money took place before there was any actual change in the firm, and therefore the defendant could not possibly be prejudiced in the conduct of his defence by the mode in which the contract is stated in the declaration.

It is then said that the defendant's fourth plea was proved. The decla-

(a) No such application was made; and *quere*, how far it can, in any case, be necessary to ask for an amendment, if, without an amendment, the erring party may have the benefit of every amendment for which he *might* have applied.

(b) Taken literally, the promise of the defendant may perhaps be considered as still more extended, and as comprehending all persons who might carry on the same kind of business at the same place, whatever their firm, and whether connected with Boyd, Burnet, & Boyd, or not.

(c) *Vide supra*, 652, n.

ration is upon an agreement to guaranty; and the breach assigned is, that the defendant did not guaranty or pay. The fourth plea states that the defendant *did* guaranty. The plea, properly understood, is, I apprehend, a very good plea. But it is not proved. My brother *Manning* insists that every written instrument is to be so construed as to give effect to every word of it; and that, if two different, but synonymous, words are used, the same construction is not to be put upon both of them. (a) That, I deny. If an agreement *to let were necessarily something different from letting, no questions could ever have arisen as to whether certain instruments amounted to leases or were mere agreements. The meaning of the word "guarantee" must be the same in the declaration, in the plea, and in the instrument on which the declaration is framed. (b) It means, not merely signing and delivering a memorandum of guarantee, which the word may, under some circumstances, mean: but it means, I undertake that A. shall pay, or, if he makes default, I will pay for him.

CRESSWELL and ERLE, Js., concurred.

Rule discharged.

(a) *Supra*, 651.

(b) *Quære*, whether the declaration and plea are to be construed with reference to any thing extrinsic.

ATKINS v. HUMPHREY and W. SCRIVENER, Executors of J. SCRIVENER. Jan. 21.

The plaintiff declared against A. & B. as executors, alleging that they as executors were indebted to him for the use and occupation of certain messuages *held* of him by them as executors under a demise to the testator, and that, in consideration of the premises, they as executors promised to pay.

Plea, by A., that B. never was executor, nor ever administered, &c.:—

Held, that the declaration was good in substance; and that the plea was bad, as setting up a personal discharge, of which B. only could avail himself.

ASSUMPSIT against the defendants, charging them as executors of the last will and testament of J. Scrivener, deceased, alleging, in the second count, that the defendants, as executors as aforesaid, were indebted to the plaintiff in 100*l.* for the use and occupation of certain messuages, &c., of the plaintiff, by the defendants, as executors as aforesaid, *held* of the plaintiff for a long time before then elapsed, under and by virtue of a certain demise theretofore made to J. Scrivener; and *thereupon afterwards, to wit, on, &c., in consideration of the last-mentioned premises, the defendants, as executors as aforesaid, promised the plaintiff to pay him the last-mentioned sum; yet the defendants, as executors as aforesaid, had not paid the same, or any part thereof, &c. [*655]

Plea, by the defendant Humphrey, that W. Scrivener never was executor of the last will and testament of J. Scrivener, nor ever administered any of the goods or chattels which were of J. Scrivener at the time of his death, as executor of the last will and testament of J. Scrivener, *modo et forma*—verification.

To this plea the plaintiff demurred generally.

Channell, Serjt., in support of the demurrer.(a) It is not competent to one of two persons jointly sued as executors, to plead that the other never was executor, that being a plea of personal discharge. If the party improperly joined, chose to take the objection, the plaintiff might enter a *nolle prosequi* as to him, and proceed against the other; 1 Wms. Saund. 207 a.(b) The plea does not deny the contract.(c)

Talfourd, Serjt., contra. The plea is good in substance, though probably it would have been held bad on special demurrer. The general principle, that one of two persons sued as executors cannot plead that the other never was executor, will not be impugned. But here, the defendants are charged as joint-contractors; and the plaintiff must prove his case against both. In *Griffiths v. Franklin*, M. & M. 146; which was an *656] action of assumpsit against two defendants as executors, the declaration contained counts on promises by the testator, and also counts on promises by the defendants as executors; to which there was a plea by both defendants of *ne unques executor*. GASELEE, J., held, that, on proof that one only of the defendants was executor, the plaintiff might have a verdict against him on those counts which laid the promises by the testator, but must fail on the others. So, in *Gray v. Palmer*, 1 Esp. N. P. C. 135,—which was an action against the defendants as the makers of a joint and several promissory note, but in which the instrument was described as a *joint* note,—two of the defendants having pleaded non assumpsit, Lord KENYON ruled that it was necessary under that plea to prove the handwriting of the third defendant, though he had pleaded a sham plea of judgment recovered. If this had been an action in which it was sought to charge the defendants, as executors, on promises by the testator, one could not have pleaded that the other was not executor; because that is matter of personal discharge only. But here the plea is in effect an informal non assumpsit. [MAULE, J. Would a plea of *plene administravit* be an answer to this action? The declaration alleges a demise of the premises to the testator, an occupation by the defendants as executors, and a promise by them, as executors, to pay the rent.] The promise by the defendants as executors does not result from the premises stated: they would be liable, if at all, *de bonis propriis*. The declaration does not allege any entry or occupation by the defendants. [TINDAL, C. J. This is not debt on the demise; but an action for use and occupation under the statute 11 G. 2, c. 19, s. 14, the words of which are “held or enjoyed.” I think the plea is clearly bad: all it amounts to is, that the defendant, W. Scrivener, is misdescribed as executor. The only question is, whether the declaration is sufficient.]

(a) The point marked for argument was, that the fact of W. Scrivener not being an executor, is no defence to the other defendant Humphrey.

(b) i. e. where the plea of *ne unques executor* is consistent with the existence of the cause of action. Vide post, 660, n.

(c) Sed vide post, 660, n.

**Channell*, Serjt., in reply. In drawing this declaration, the pleader evidently intended to rely upon the case of *Wigley v. Ashton*, 3 B. & Ald. 101, though he has not very well carried out that intention. It was there held that a count in assumpsit against husband and wife, who was administratrix with the will annexed, upon promises by the testator to pay the rent, could not be joined with counts upon promises by the husband and wife, as administratrix, for use and occupation by them after the death of the testator. That case shows that the right mode of declaring would be to charge the defendants personally; and, in substance, this declaration does so treat the liability of the defendants: it states a holding by them of the premises demised to the testator; and they are clearly responsible, though, in fact, they may never have entered. [*657]

TINDAL, C. J. In this case there is no special demurrer to the declaration, and therefore the objection, if any, arises as upon general demurrer; and the question is, whether the declaration is bad in substance. I think it is not. I can conceive a state of facts to exist under which all that is stated here would be sustainable in point of law. The action is brought upon the statute 11 G. 2, c. 19, s. 14, which provides that "it shall be lawful for the landlord and landlords, where the agreement is not by deed, to recover a reasonable satisfaction for the lands, tenements, or hereditaments held or occupied by the defendant or defendants, in an action on the case for the use and occupation of what was so held and enjoyed." As far, therefore, as the letter of the act goes,—the words being in the alternative, "held or enjoyed,"—there is no necessity that the land should be occupied as well as held; at least where the omission is not pointed out as ground of special demurrer. One may conceive cases of land taken but not entered upon: in such a case there is no reason why the party so taking,—inasmuch as he keeps another from the occupation,—should not be liable under this statute. [*658] The declaration in the present case alleges a demise to the testator of the messuages in question, and, without stating any entry by the defendants, alleges that they, as executors, promised to pay the rent. I can readily understand, that if the testator originally entered under a demise, and the executors do not give up the premises, the assets of their testator may be made chargeable during such time as they virtually retain them in their possession. I therefore think this declaration is sufficient on general demurrer; and, as the plea is bad, for the reason already pointed out, that the plaintiff is entitled to judgment.

MAULE, J. I also am of opinion that the declaration is good, and the plea bad. The declaration states that the defendants were indebted to the plaintiff for the use and occupation of certain premises by the defendants, held of the plaintiff, and that they promised to pay. Now, the fourteenth section of the 11 G. 2, c. 19, provides that "it shall be lawful for the landlord and landlords, where the agreement is not by deed, to

recover a reasonable satisfaction for the lands, tenements, or hereditaments held or occupied by the defendant or defendants, in an action on the case for the use and occupation of what was so held and enjoyed." I therefore think this declaration shows a good cause of action. Further, I think it discloses a sufficient cause of action against the defendants in their representative capacity. It, in terms, so charges them; for, it means,—unless it is impossible that the defendants could be liable in their representative character,—that the plaintiff is seeking to charge *659] them in respect of the assets of their testator. *It is probable that they may be so liable. If the testator held the premises, and if the defendants, since his decease, have not actually occupied, but have held only, and rent has accrued, they would not be personally liable, but the assets in their hands would be liable. Then, the declaration charging the two defendants as executors, one of them pleads that the other never was executor, nor ever administered any of the goods of the deceased. That plea is addressed, not to the promise, but to the allegation at the commencement of the declaration, that the defendants and each of them were executors. That allegation is divisible, the matter of the plea being matter of personal exemption only. Just as, under a plea of *plene administraverunt* by two, there may be a verdict against one who has assets, and the other may be discharged. One cannot avail himself of a defence that is peculiar to his co-defendant.

CRESSWELL, J. I am of the same opinion. The plaintiff in his declaration describes the two defendants as executors, and alleges that they, as executors, were indebted to him for the use and occupation of certain messuages of the plaintiff, by them as executors *held* of the plaintiff under and by virtue of a demise to the testator, and that, in consideration of the premises, they, as executors promised to pay. The difficulty that at first presented itself to my mind was, that, if the plaintiff is suing for use and occupation, it is not alleged that the defendants had *occupied* the premises; and, if for rent, it is not alleged that rent was due. But the statute 11 G. 2, c. 19, s. 14, removes that difficulty. The case of *Pinero v. Judson*, 6 Bingh. 206, 3 M. & P. 497, is a distinct authority to show that actual occupation is not necessary to entitle the landlord to maintain the action.

*660] *As to the plea; where several persons are charged as executors,—and there is nothing here to show that these defendants did not promise as executors, or that such a promise might not result in law,—they may deny their representative character, but then each defendant must deny it for himself.

ERLE, J. For the reasons already stated, I think the declaration sufficient on general demurrer, and the plea bad.

Judgment for the plaintiff.(a)

(a) Where a plaintiff declares against A. and B. as executors of C. upon a cause of action arising in the lifetime of C., A. cannot plead that B. is not an executor, because the plea admits

the cause of action and simply denies the personal liability of B. 1 Wms. Saund. 207 a, n. But, *quære*, whether this rule is applicable to a declaration upon a cause of action arising *after the death of C.* Here, the declaration alleges that the defendants held as executors, under a demise made to J. Scrivener; i. e. that they held as parties possessed of a term which had been granted to J. Scrivener, and which had devolved upon the defendants as the true personal representatives,—the legal assigns,—of J. Scrivener. The plea—its truth being confessed by the demurrer—discloses a state of things which appears to be inconsistent with the possibility of such a devolution of the term to the defendants. Independently, therefore, of the character in which the defendants were sued, the record appears to show that they did not hold either as executors of J. Scrivener, or as joint-tenants under a demise made to him, as alleged in the declaration.

In this case, if W. Scrivener had pleaded that he never was executor, and that plea had been found for him, could the plaintiff have recovered against Humphrey alone, upon the declaration as framed?

*KINGDOM v. COX. Jan. 23.

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The declaration stated, that, in consideration that the plaintiff would accept, receive, and pay for certain goods, the defendant promised to supply them of the various sizes to be shown in drawings to be provided by the plaintiff's architect, at a certain price, and to use his, the defendant's, best endeavours to deliver certain quantities on certain specified days, provided the drawings for the first quantity were sent to the defendant within three days, and for the remainder within three weeks; and averred, that, although the plaintiff had always been ready and willing to accept and receive the goods, and although he did *within a reasonable time* after the making of the agreement, duly and according to the said agreement, provide drawings, &c., and although a reasonable time had elapsed, the defendant did not within a reasonable time supply the goods.

Plea—that the plaintiff did not, *within the time so agreed upon*, duly and according to the agreement, provide or deliver drawings, &c. :—

Held, bad, the delivery of the drawings within the specified times not being a condition precedent to the plaintiff's right to complain of a non-delivery within a reasonable time.

ASSUMPSIT. The declaration stated, that, whereas on the 28th of November, 1844, in consideration that the plaintiff would accept, receive, and pay for the goods thereafter mentioned, upon the terms, &c. in that behalf mentioned, the defendant by a certain memorandum in writing promised to supply him with cast-iron girders of the various sizes to be shown in drawings to be provided by the plaintiff's architect, and to deliver the same perfect, at the price therein mentioned, and to use his, the defendant's, best endeavours to deliver fifty tons of the said girders on or before the 31st of February, 1845, fifty tons more on or before the 28th of January, 1845, and fifty tons more on or before the 31st of March, 1845, provided the drawings for the first fifty tons were sent to the defendant within a certain time then agreed upon between them, to wit, within three days after the receipt of the said memorandum, and the drawings for remainder within three weeks of the receipt of the said memorandum; payment to be made, &c. &c. Averment, that, although the plaintiff had always been ready and *willing to receive the said girders, and although he did, *within a reasonable time after the making of the said agreement*, to wit, on, &c., *duly, and according to the said agreement, provide and deliver to the defendant*, who then received the same, *fifty drawings, &c.*, and although a reasonable time had since elapsed, yet the defendant did not nor

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would *within such reasonable time*, or at any time, supply the plaintiff with the said girders, &c.

Plea, that the plaintiff did not within the time so agreed upon between the plaintiff and the defendant, duly, and according to the said agreement, provide or deliver to the defendant drawings, &c., which he the plaintiff required from the defendant, in manner and form, &c.

Special demurrer, assigning for cause, amongst others, that the plea treated the delivery of the drawings within a certain time, as a condition precedent to the defendant's performance of the contract; whereas, a delivery within a reasonable time was all that was requisite, according to the real meaning of such contract.

Channell, Serjt., (with whom was *Bramwell*,) in support of the demurrer. The contract, in contemplation of law, is a contract to deliver the goods within a reasonable time; and the breach assigned is, the non-delivery within a reasonable time. That is all that the defendant was entitled to put in issue. Another part of the contract, it is true, gives the plaintiff an option to call upon the defendant to deliver within specified times, provided he furnishes certain drawings within certain other limited times. But the delivery of the drawings within those times was clearly not a condition precedent to the plaintiff's right to call for a performance of the contract on the defendant's part within a reasonable time. [CRESSWELL, J. The plea clearly is intended by the defendant as a traverse of something *663] the plaintiff has *alleged in his declaration.] Whatever his intention, he has not successfully expressed it.

Talfourd, Serjt., *contrà*. Unless the declaration is to be understood as alleging that which the plea traverses, it is bad in substance. The delivery of the drawings was necessarily a condition precedent to the plaintiff's right to complain of a breach of the agreement on the defendant's part. The work could not be done without them. What necessity is there for importing a reasonable time for the delivery of the drawings, when specific dates are given? [CRESSWELL, J. The question is, whether the defendant was bound to make the girders within a reasonable time, if the drawings were not furnished by the times stipulated, provided they were furnished within a reasonable time.] Taking the agreement according to its legal effect, the plea does traverse it. [TINDAL, C. J. Why could not the defendant have taken issue on the delivery within a reasonable time?]

Talfourd, Serjt., prayed leave to amend.

TINDAL, C. J. The defendant has left it ambiguous whether he meant to put in issue the delivery of the drawings within a reasonable time, or their delivery within the time provisionally stipulated for by the contract. The latter clearly is not a condition precedent to the plaintiff's right to complain of a non-delivery of the girders within a reasonable time. The defendant may amend, on the usual terms, within a week, if the facts will permit, by traversing the breach as alleged in the declaration.

The rest of the court concurring—

Rule accordingly.

*The QUEEN v. The Rev. RICHARD FOLEY, Clerk. [*664
Jan. 23.

A private act of parliament,—after providing for a sale of glebe land, and the erection of an additional church with part of the proceeds,—directed that the curate of the new church should, during the incumbency of A., the then rector, be *appointed* by him; and that, after the death, avoidance, or resignation of A., the new church should become the principal church, with all the accustomed rights, immunities, and privileges appertaining to a mother church, and the then church should become and be deemed a chapel of ease thereto, to be served by a minister capable of having cure of souls; and that “the patronage of or right of *presentation* to the chapel, as well as the patronage of or right of *presentation* to the new church, should be vested in the patron of the rectory, his heirs and assigns, so, nevertheless, that the minister of the chapel should not be removable at pleasure:—

Held, that the chapel of ease thus created by the act, was thereby made *presentative*, and not *donative*. And

Semble, that, if it had been at first *donative*, it would have ceased to be so, upon a presentation being once made by the patron to the ordinary, followed by the institution and induction of the presentee.

QUARE Impedit. The first count stated, that, by a certain act of parliament made and passed in the 7 G. 4, A. D. 1826, intituled “An act for effecting a sale of part of the glebe lands belonging to the rectory of Kingswinford, otherwise Swinford Regis, in the county of Stafford, and the mines in and under the same, to the Rt. Hon. John William, Viscount Dudley and Ward, and for other purposes,”—after reciting, (amongst other things,) as the facts were, that the Rev. Nathaniel Hinde, clerk, was the rector of the said rectory of Kingswinford, in the county of Stafford, and that the said rectory was and stood limited to such uses as the said Viscount Dudley and Ward should by deed or will, to be executed and attested in such manner as in and by a certain indenture of release of the 15th of June, 1804, was mentioned, direct, limit, and appoint, and that the Bishop of Lichfield and Coventry was the ordinary of the parish of Kingswinford aforesaid, and that there were certain glebe lands belonging to the said rectory, and certain mines under the same; and after also reciting, as the fact was, that the said Nathaniel Hinde, *as such rector as aforesaid, had then lately entered into an agree- [*665
ment, dated the 11th of March, 1826, with the said Viscount Dudley and Ward, with the privity and consent of the said Bishop of Lichfield and Coventry, and subject to the approbation of parliament, to the effect, amongst other things, that the said Nathaniel Hinde, as such rector as aforesaid, agreed to sell to the said Viscount Dudley and Ward a part of the said glebe lands therein described, together with the mines thereunder, for the sum of 19,290*l.* 11*s.* 3*d.*; that certain expenses, amounting to 193*l.*, should be paid out of the said purchase-money; that the remainder of the purchase-money should be considered and taken as part of the said rectory; and that, after defraying thereout the expenses of erecting a new rectory-house and out-buildings, and setting apart a sum not exceeding 1929*l.* 1*s.*,—being 10*l.* per cent. upon the amount of the purchase-money,—to be applied in or towards the erection of a new church, as thereinafter mentioned,

the final residue thereof should be invested for the benefit of the said rectory, in the manner therein mentioned ; and that a sum not exceeding the said sum of 1929*l.* 1*s.* should be applied by and out of the said residuary purchase-money, in or towards the erecting of a new church within the said parish of Kingswinford, provided the parishioners thereof should, by rate, subscription, or otherwise, and either with or without the aid of the commissioners for building additional churches in populous places, within five years from the passing of the said act agreed to be applied for, raise so much money as, with the said sum not exceeding 1929*l.* 1*s.*, would build a good and substantial church, capable of holding one thousand persons at the least ; and that, in case such new church should be built, by the means, and within the time, aforesaid, then, and in such case, the

*666] curate or officiating minister thereof, who should, during *the life or incumbency of the said Nathaniel Hinde, the then rector of Kingswinford, be appointed by him, the said Nathaniel Hinde, to act during his life or incumbency, should be paid or allowed by the said rector such yearly stipend or salary as, with the rents which might arise from the letting of the pews of the proposed new church, would make up 150*l.* *per annum* ; and that, from and after the death, resignation, or avoidance of or by the said Nathaniel Hinde, the said new church should become the principal or mother church, and the then church should become a chapel of ease thereto, and the patronage of, or presentation to, the same chapel, as well as the patronage of, or presentation to, the said new church, should be vested in Viscount Dudley and Ward, his heirs and assigns, patron and patrons of the said rectory of Kingswinford ; and that, from thenceforth, the interest of the purchase-money, or so much thereof as should not be applied and expended, or the rents and profits of the estates to be purchased therewith, should be received and enjoyed by the curate or minister for the time being of the said chapel of ease, for ever : and, after reciting that it would be greatly for the advantage of the said Nathaniel Hinde, and for the benefit of the said rectory of Kingswinford, and also of the parishioners of the said parish of Kingswinford, if the sale so agreed to be made to Viscount Dudley and Ward, and the several other agreements thereinbefore mentioned, should be carried into effect—it was, on the petition of the said Nathaniel Hinde, Viscount Dudley and Ward, and the Bishop of Lichfield and Coventry, enacted, that it should and might be lawful to and for Viscount Dudley and Ward, at any time within six calendar months next after the passing of that act, to pay or cause to be paid the sum of 19,075*l.* 1*s.* 3*d.* sterling, being the residue of the said purchase-money or sum of 19,290*l.*

*667] 11*s.* 3*d.*, after deducting the *expenses incurred in boring the said lands, amounting to 193*l.*, and the expense of making a certain valuation in the act mentioned, amounting to 22*l.* 10*s.*, into the Bank of England, in the name, and with the privity, of the accountant-general of the court of Chancery, to be placed to an account there “ *Ex parte* the rector of Kingswinford, in the county of Stafford,” pursuant to the method

prescribed by the act of the 12 G. 1, c. 32, and the general orders of the said court, and without fee or reward, according to the 12 G. 2, c. 24; and that, from and immediately after the said sum of 19,075*l.* 1*s.* 3*d.* should be so paid into the Bank of England as aforesaid, all and singular the pieces or parcels of land situate, lying, and being in the parish of Kingswinford aforesaid, particularly described and set forth in the schedule to that act annexed (being part of the glebe lands belonging to the said rectory of Kingswinford, and containing in the whole, including the sites of the present rectory-house and buildings, 38 a. 2 r. 3 p. (a little more or less,) together with all the mines, veins, layers, and strata of coal and iron-stone, brick-clay, and other mines and minerals in and under the same several pieces or parcels of land, and the rights, members, and appurtenances thereto belonging; and the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits of all and singular the same pieces or parcels of land and mines, should be freed and discharged, and absolutely acquitted and exonerated of and from all the estate, right, title, interest, claim, and demand whatsoever of the said Nathaniel Hinde and his successors, rector and rectors for the time being of the said parish of Kingswinford, into and upon the same; and that the same land and mines, so freed and discharged, acquitted and exonerated, should be vested in the said Viscount Dudley and Ward, and his heirs, to the only use and behoof of him the said Viscount [668
Dudley and Ward, his heirs and assigns, for ever: And it was further enacted, that all the costs, charges, and expenses preparatory to, attending, or in any wise relating or incident to, the applying for and obtaining that act, should be paid out of the said sum of 19,075*l.* 1*s.* 3*d.* so to be paid into the Bank of England as aforesaid, and the residue of the said sum of 19,075*l.* 1*s.* 3*d.*, after payment of such costs, charges, and expenses as aforesaid, and after setting apart the several sums of 3000*l.* sterling, and 1929*l.* 1*s.* sterling, for the purposes thereafter directed, should, when so paid in, be laid out by the said accountant-general in the purchase of navy or victualling-bills, or exchequer-bills; and that, out of the interest arising from the money so to be laid out in the purchase of navy or victualling-bills, or exchequer-bills, as aforesaid, the annual sum of 200*l.*, to commence and take effect from the day whereon the said sum of 19,075*l.* 1*s.* 3*d.* should be so paid in, or such less annual sum as, with the rents and profits of the estates to be actually purchased from time to time as thereafter directed, should amount to the annual sum of 200*l.* in the whole, should, under the order and direction of the court of Chancery, on a petition to be preferred in a summary way by the rector of Kingswinford aforesaid for the time being, be paid, by equal half-yearly payments, to the said rector and his successors; and the residue of such interest, and the money to be received for the navy or victualling-bills, or exchequer-bills, so to be purchased as they should be respectively paid off by government, should be laid out by the said accountant-general in the

purchase of other navy or victualling-bills or exchequer-bills; provided that it should and might be lawful for the said court to make such general order or orders, or special order or orders, as to the said court should seem

*669] *necessary, &c. &c.; all which navy, victualling, and exchequer-bills, whether purchased or exchanged, should be deposited in the Bank of England, in the name of the said accountant-general, and should there remain until a proper purchase or purchases of real estates wherein to invest the money to be laid out in the purchase of such bills, should be found, and proved by the said court of Chancery, and until the same bills should, upon a petition to be preferred to the said court in a summary way by the said rector or his successors, be ordered to be sold by the said accountant-general, for the completing of such purchase or purchases as thereafter authorized; and, if the money to be produced by the sale of such navy, victualling, or exchequer-bills, should exceed the amount of the money thereinbefore originally directed to be laid out in the purchase of such bills, then and in that case only the surplus or excess of the money to be produced by such sale, over and above the money so originally directed to be laid out as aforesaid, after discharging the expenses of the application thereby authorized to be made to the said court, should be paid to such person or persons respectively as would have been entitled to receive the rents and profits of the estates thereafter directed to be purchased, in case the same had been purchased pursuant to that act, or to the personal representatives of such person or persons: And it was further enacted that it should be lawful for the said court of Chancery, from time to time, upon a petition to be preferred to the said court in a summary way, by or on the behalf of the said rector or his successors, to order and direct the sale of all or any of the navy, victualling, or exchequer-bills which should, for the time being, be standing in the name of the accountant-general on the account aforesaid, and to order and direct all or any

*670] part of the moneys to arise by any such sale or sales, *not exceeding the amount of the money thereinbefore originally directed to be laid out in the purchase of such bills, to be laid out and applied in the purchase of freehold manors, messuages, farms, lands, tenements, or hereditaments of an estate of inheritance in fee-simple in possession, or of any copyhold lands or hereditaments convenient to be held therewith, such copyhold lands or hereditaments not exceeding in value one sixth part of the whole estates to be so purchased, free from all encumbrances, except quit rents, fee-farm rents, or other usual out-goings or payments, to be situate somewhere within the diocese of Lichfield and Coventry; and that all and singular the freehold and copyhold manors, messuages, farms, lands, tenements, and hereditaments which should be so purchased as aforesaid, should be thereupon immediately conveyed, surrendered, and assured unto and to the use of the said rector and his successors, for ever, and should, from the time of such conveyance and surrender or assurance, be annexed to, and for ever thereafter continue to be part of, the said rec-

tory, but subject as thereafter mentioned: And it was further enacted, that, out of the said sum of 19,075*l.* 1*s.* 3*d.* so to be paid into the Bank of England as aforesaid, the sum of 1929*l.* 1*s.* should be set apart for the purposes thereafter directed, and should be laid out by the accountant-general in the purchase of navy or victualling-bills, or exchequer-bills, and that the interest arising from the money so to be laid out in navy or victualling-bills, or exchequer-bills, as last mentioned, and the money to be received for the same bills as they should respectively be paid off by government, should be laid out by the accountant-general in the purchase of other navy or victualling-bills, or exchequer-bills, provided that it should be lawful for the said court to make such general order or orders, or special order or orders, as to the said court should seem necessary; that, *whenever the exchequer-bills of the date of those in the hands of the said accountant-general should be in the course of payment by government, and the new exchequer-bills should be issued, such new exchequer-bills might be received in exchange for those which were so in the course of payment, as should be effectual for the enabling such receipt in exchange, and in that event the interest of the old bills should be laid out as before directed with respect to the interest where the bills were paid off; all which navy, victualling, and exchequer-bills, whether purchased or exchanged, should be deposited in the Bank of England in the name of the accountant-general, and should there remain until the same should be ordered to be sold as thereafter directed: And it was further enacted, that, in case the parishioners of the parish of Kingswinford aforesaid should, by rate, subscription, or otherwise, and either with or without the aid and assistance of the commissioners for building additional churches in populous parishes, raise so much money as, with the money to be produced by the sale of the navy, victualling, or exchequer-bills last thereinbefore directed to be purchased, (including the bills to be purchased with the interest of the said sum of 1929*l.* 1*s.*.) would be sufficient to defray the costs, charges, and expenses of erecting and building a substantial new church in the parish of Kingswinford, capable of holding one thousand persons at the least, then and in such case, but not otherwise, it should be lawful for the court of Chancery, and the said court was thereby directed, upon a petition to be preferred to the said court in a summary way, by or on behalf of the said rector or his successors, or by or on behalf of the said Viscount Dudley and Ward, or other the patron or patrons of the said rectory for the time being, to order and direct the navy, victualling, or exchequer-bills last thereinbefore directed to be purchased *with the said sum of 1929*l.* 1*s.*, to be sold, and the money to arise from the sale thereof to be applied in or towards the erection of such new church: and it was further enacted, that, in case a new church should be built in the said parish of Kingswinford, partly by means of the money to be produced by the sale of the last-mentioned navy, victualling, or exchequer-bills, then and in such case the curate or officiating minister

thereof, who should, during the life or incumbency of the said Nathaniel Hinde, the then rector of Kingswinford aforesaid, be *appointed* by him the said Nathaniel Hinde to act during his life or incumbency, should be paid or allowed, out of the interest of the money first thereinbefore directed to be laid out in the purchase of navy, victualling, or exchequer-bills, or so much thereof as should not, for the time being, be invested in the purchase of real estates as aforesaid, if such interest should be sufficient for that purpose, but if not, then by the said Nathaniel Hinde out of his own moneys, the sum of 100*l. per annum*, over and above the rents which might arise from the letting the pews in the said new church ; and then and in such case also, from and after the death, avoidance, or resignation of the said Nathaniel Hinde, the said new church should become the principal or mother church of Kingswinford aforesaid, with all the accustomed rights, immunities, and privileges appertaining to a mother church, and the then church should become and be deemed a chapel of ease thereto, to be served by a minister capable of having cure of souls ; *and the patronage of, or right of presentation to, the same chapel, as well as the patronage of or right of presentation to the said new church, should be vested in the said Viscount Dudley and Ward, his heirs and assigns, patron and patrons of the said rectory of Kingswinford, so, nevertheless, that the minister of the said chapel should not be removable at pleasure ; and the annual sum* *673]

*thereinbefore directed to be paid to such rector out of the interest of the money to be invested in such navy, victualling, or exchequer-bills as aforesaid, should belong and (under the order and direction of the court of Chancery, on a petition to be preferred in a summary way) be payable to such minister of the said chapel and his successors, and any hereditaments which might have been purchased pursuant to the direction thereinbefore contained, should then forthwith, by virtue of that act, become and be vested in such minister and his successors for ever ; and, in case any part of the money thereinbefore directed to be invested in the purchase of real estates as aforesaid, should remain undisposed of, any future application by petition to the said court to have the same or any part thereof invested in the purchase of freehold or copyhold hereditaments as aforesaid, should be made by the minister for the time being,—and not by the rector for the time being,—with the consent and approbation of the ordinary for the time being ; and the hereditaments to be purchased in consequence of any such application, should, when so purchased, be conveyed or surrendered and assured to and vested in the said minister for the time being and his successors, for ever ; and the said minister, for the time being, should be a sole corporation, capable of taking, holding, and enjoying the hereditaments to be purchased pursuant to that act—as by the record of the said act of parliament, remaining among the rolls of parliament, at Westminster, in the county of Middlesex, reference being thereto had, would more fully and at large appear. The count then alleged, that Viscount Dudley and Ward did, in pursuance of the act, pay

the sum of 19,075*l.* 1*s.* 3*d.* into the Bank of England ; that the costs and charges mentioned in the act were thereout duly paid ; that the residue, after setting apart 3000*l.* and 1929*l.* 1*s.*, was invested in manner required by the act ; that the 1929*l.* 1*s.* *so set apart, was laid out in the purchase of exchequer-bills ; that, on the 1st of January, 1828, [674 the parishoners of Kingswinford did, in the manner required by the act, raise 2000*l.*, which, with the money produced by the sale of the last-mentioned exchequer-bills, and 4000*l.* given by the commissioners for building additional churches in populous parishes, was sufficient to defray the costs of erecting a substantial new church in the said parish of Kingswinford, capable of holding one thousand persons ; that the court of Chancery did, on the 1st of February, 1828, on the petition of the said Nathaniel Hinde, order that the exchequer-bills so purchased with the 1929*l.* 1*s.* should be sold, and that the money arising from the sale thereof should be applied in the erection of such new church as in the act mentioned ; that the said exchequer-bills were afterwards sold, and produced 2200*l.* ; that, within five years from the passing of the act, such new church was built in the said parish of Kingswinford, partly by means of the sum of money so produced as aforesaid by the sale of the last-mentioned exchequer-bills, and partly by the sum of money so raised by the said parishioners of Kingswinford as aforesaid, together with the sum so given by the said commissioners for building additional churches in populous parishes, and which new church was duly consecrated by Henry, Bishop of Lichfield and Coventry, then being the ordinary of the said parish ; that, after the building of the said new church, to wit, on the 12th of November, 1831, to wit, at, &c., the said Nathaniel Hinde died, without having previously avoided or resigned his said living ; whereupon, and by virtue of the provisions of the said act of parliament, the said new church then became the principal or mother church of Kingswinford aforesaid, and the then church became such a chapel as in the said act mentioned, and which same chapel then acquired, and had from thenceforth *continually [675 been called and known by, the name of, and then was, the chapel of St. Mary's, Kingswinford, and the patronage of and right of presentation to the same chapel, as well as the patronage of and right of presentation to the said new church, became and was then and there vested in the said Viscount Dudley and Ward, and his heirs, he the said Viscount Dudley and Ward then being the patron of the said rectory of Kingswinford, and the said Viscount Dudley and Ward then and there became and was seised as of fee of and in the same advowsons, rights of patronage, and presentation ; that, being so seised thereof, he the said Viscount Dudley and Ward, on the first of December, 1831, presented one William Henry Cartwright, then being a minister capable of having cure of souls, his clerk, to the said chapel, who, upon the same presentment, afterwards, to wit, on the day and year last aforesaid, was admitted, instituted, and inducted into the same chapel ; that, on the 26th of July, 1831, to wit, at,

&c. aforesaid, the said Viscount Dudley and Ward, who had then become and then was Earl of Dudley, made and published his last will and testament in writing, dated and attested, &c., and thereby gave and devised, amongst other things, the said advowsons and rights of patronage and presentation of him the said Earl of Dudley, to the said chapel, and to the said church, to certain trustees for the term of ninety-nine years, to be computed from his the said Earl of Dudley's decease, if one William Humble Ward, in the said will mentioned, should so long live—upon trust, when and as each or either of the said livings should first become vacant after his decease, during the same term, to present thereto respectively such several persons as he should nominate for that purpose by any codicil or codicils to that his will; and, if he should make no such appointment, or, having made one, the nominee should die or refuse to

*676] accept such living, then *to present to each and every such last-mentioned living such person or persons as the said W. H. Ward should nominate for that purpose; that, on the 6th of March, 1833, the said Earl of Dudley died so seised of the said advowsons and rights of patronage and presentation as aforesaid, without having in anywise altered or revoked his said will, and without having made any such nomination as therein mentioned by any codicil to his said will; that the said trustees and W. H. Ward, (who by the death of the said Earl of Dudley became and was William Humble, Lord Ward,) survived him the said Earl of Dudley, and thereby, and under and by virtue of the will of the said Earl of Dudley, the said trustees became and were possessed of the said advowsons and rights of patronage and presentation for and during the said term of ninety-nine years from the death of the said Earl of Dudley, if the said William Humble, Lord Ward, should so long live; that, on the 9th of October, 1835, at, &c. aforesaid, the said chapel of St. Mary's, Kingswinford, became vacant by the free resignation of the said W. H. Cartwright to the ordinary of the said chapel, to wit, the said Henry, Bishop of Lichfield and Coventry, and by the acceptance by the said bishop of the said resignation; and that notice of such resignation was afterwards, during the life of the said William Humble, Lord Ward, and before the said term of ninety-nine years from the death of the said Earl of Dudley thereinbefore mentioned had expired, to wit, on, &c., at, &c., duly given by the said ordinary of the said chapel to the said patrons thereof, and to the said William Humble, Lord Ward; and the said patrons and the said William Humble, Lord Ward, then and there had notice of the said resignation of the said W. H. Cartwright; that the said chapel of St. Mary's, Kingswinford, remained and was vacant and unprovided with a minister, for a period of eighteen months and upwards after the resignation of

*677] the said W. H. Cartwright, and after the said patrons of the said chapel, and the said William Humble, Lord Ward, had notice of the said resignation of the said W. H. Cartwright, and of the said chapel being so vacant as aforesaid, and the said chapel still remained

vacant and unprovided with a minister; and by reason thereof, no minister having been presented or collated to the said chapel during the time aforesaid, by the patron, ordinary, or metropolitan of the said chapel, the said right of presentation had devolved upon the queen, and it then belonged to the queen to present a fit minister to the said chapel of St. Mary's, Kingswinford, so vacant by the lapse of time as aforesaid, in manner aforesaid; and that the said John, Bishop of Lichfield, and Richard Foley, did unjustly disturb and hinder the queen in presenting thereto.

The second count stated, that, before and at the time of the presentation next thereafter mentioned, the Right Hon. John William, Earl of Dudley, was seised of the advowson and right of presentation to the chapel of St. Mary's, Kingswinford, as of fee, and, being so seised, on the 1st of September, 1831, at, &c. aforesaid, presented one W. H. Cartwright, his clerk, to the said chapel, being vacant, who was afterwards, to wit, on the 2d of September, 1831, duly admitted, instituted, and inducted into the same chapel on the said presentation of the said Earl of Dudley: that afterwards, to wit, on, &c., the said Earl of Dudley made and published his last will and testament in writing, bearing date, &c., and thereby gave and devised, amongst other things, the said advowson and right of presentation of him the said Earl of Dudley, to certain trustees for the term of ninety-nine years, to be computed from his the said Earl of Dudley's decease, if one W. H. Ward, in the said will mentioned, should so long live—upon trust, when and as the said living should first become vacant after his *decease, during the said term, to present thereto such person as he should nominate for that purpose by any codicil or [*678 codicils to that his will, and if he should make no such appointment, or, having made one, the nominee should die or refuse to accept such living, then to present to such living such person as the said W. H. Ward should nominate for that purpose; and that, afterwards, to wit, on the 6th of March, 1833, at, &c. aforesaid, the said Earl of Dudley died so seised of the said advowson and right of presentation as aforesaid, without having in any wise altered or revoked his said will, and without having made any such nomination as therein mentioned by any codicil thereto; and the said trustees and W. H. Ward, who, by the death of the said Earl of Dudley, became and was William Humble, Lord Ward, survived him the said Earl of Dudley; and thereby, under and by virtue of the said will of the said Earl of Dudley, the said trustees became and were possessed of the said advowson and right of presentation for and during the said term of ninety-nine years from the death of the said Earl of Dudley, if the said W. H., Lord Ward, should so long live: that, afterwards, to wit, on the 9th of October, 1835, the said chapel of St. Mary's, Kingswinford, became vacant by the free resignation of the said W. H. Cartwright to the ordinary of the said chapel, to wit, the said Bishop of Lichfield and Coventry, and by the acceptance of the said bishop of the said resigna-

tion ; and that notice of the said resignation was afterwards, during the life of the said W. H., Lord Ward, and before the said term of ninety-nine years from the death of the said Earl of Dudley had expired, to wit, on, &c. last aforesaid, at, &c. aforesaid, duly given by the said bishop to the said patrons of the said chapel, and to the said W. H., Lord Ward, and the said patrons and the said W. H., Lord Ward, then and there had *679] notice of the said resignation of the said *W. H. Cartwright: that the said chapel of St. Mary's, Kingswinford, remained and was vacant and unprovided with a parson for a period of eighteen months and upwards after the resignation of the said W. H. Cartwright, and after the said patrons of the said chapel and the said W. H., Lord Ward, had notice of the resignation of the said W. H. Cartwright, and of the said chapel being so vacant as aforesaid, and the said chapel still remained vacant and unprovided with a parson ; and by reason thereof, no parson having been presented or collated during the time aforesaid, to the said chapel by the patron, ordinary, or metropolitan, of the said chapel, the said right of presentation had devolved upon the queen, and it then belonged to the queen to present a fit person to the said chapel of St. Mary's, Kingswinford, so vacant by the lapse of time as aforesaid, in manner aforesaid: and that the said John, Bishop of Lichfield, and Richard Foley, did unjustly disturb and hinder the queen in presenting thereto.

Pleas—to the first count, that the said Earl of Dudley, by his said last will and testament in the said first count of the declaration mentioned, so signed as therein mentioned, gave and devised the said advowsons, rights of patronage and presentation comprised in the said term of ninety-nine years, after the determination of the said term, and after the decease of the said W. H. Ward, to W. Ward, the eldest son of the said W. H. Ward, during his natural life ; *that, after the said chapel of St. Mary's, Kingswinford, has so become vacant by the free resignation of the said W. H. Cartwright as aforesaid, and within six months after the said resignation, and the acceptance thereof as aforesaid, to wit, on, &c. aforesaid, the said W. H., Lord Ward, departed this life, and thereupon the said term of ninety-nine years ended and determined, and the patronage of and right of presentation to the said chapel became and was vested in *680] the said *W. Ward, then William, Lord Ward, as devisee of the said Earl of Dudley ; that thereupon, afterwards, the said William, Lord Ward, after the death of the said W. H., Lord Ward, and within six months after the resignation of the said W. H. Cartwright, and the acceptance thereof as aforesaid, to wit, on the 30th of January, 1836, duly nominated and appointed the defendant, Richard Foley, being then a clerk in orders, and in all respects qualified in that behalf to the said chapel of St. Mary's Kingswinford, with all and singular the rights, members, and appurtenances thereto belonging ; that thereupon, afterwards, to wit, on the 2d of March, 1836, the Hon. and Right Rev. Henry, Lord

bishop of Lichfield and Coventry, being then the ordinary of the diocese in which the said chapel was situate, did, in pursuance of the aforesaid nomination of the said William, Lord Ward, by his certain license in that behalf then duly made and given, license the defendant, Richard Foley, to read prayers, preach, officiate, and perform divine offices as curate or minister within the said chapel of St. Mary's, Kingswinford, according to law, and did invest him, the said Richard Foley, with all and singular the rights, perquisites, salaries, members, and appurtenances thereto belonging, and did by those presents authorize him to preach the Word of God, and license him to be curate or minister thereof; and that thereupon, to wit, on, &c. last aforesaid, the defendant, Richard Foley, became and had ever since continued to be, and still was, minister of the chapel of St. Mary, Kingswinford, aforesaid; verification, and prayer of judgment.

To the second count, the defendant pleaded that, before the said Earl of Dudley became so seised of the advowson and right of presentation to the said chapel of St. Mary, Kingswinford, it was, by the said act made and passed in 1826, intituled, &c., after reciting as in the first count mentioned, enacted in "manner and form as in the said first count in that behalf alleged, as by the record, &c.: that the said John Williams, Viscount [*681 Dudley and Ward, in the said act mentioned, did, in pursuance of the said act, within six months next after passing the said act, to wit, on the 24th of November, 1826, aforesaid, pay the said sum of 19,025*l.* 1*s.* 3*d.*, in the said act mentioned, into the Bank of England, &c., according to the provisions of, and in the manner appointed by, the said act of parliament, and that the said costs, charges, and expenses in the said act in that behalf mentioned were then thereout duly paid, and the residue thereof, after setting apart the said two sums of 3000*l.* and 1929*l.* 1*s.*, was then duly invested in the manner required by the said act; that the said sum of 1929*l.* 1*s.* so set apart for the purposes in the said act in that behalf directed as aforesaid, was, to wit, then and there, laid out in exchequer-bills, according to the provisions of the said act of parliament; and that, afterwards, to wit, on the 1st of January, 1828, to wit, at, &c., the parishioners of the parish of Kingswinford aforesaid did, in the manner required by the said act, raise a sum of money, to wit, 2000*l.*, which, together with the money produced by the sale of the bills last thereinbefore mentioned, and a certain other sum, to wit, 4000*l.*, then and there for that purpose given by the said commissioners for building additional churches in populous parishes, was sufficient to defray the costs, &c., of erecting and building a substantial new church in the said parish of Kingswinford, capable of holding one thousand persons; and that, thereupon, afterwards, to wit, on the 1st of February, 1828, the court of Chancery directed a sale of the exchequer-bills; that, within five years from the passing of the act of parliament, to wit, on the 1st of March, 1830, such a new church

*682] as it the said act mentioned was built in the said parish of *Kingswinford, partly by means of the money produced by the sale of the exchequer-bills, and partly by the money so raised by the parishioners of Kingswinford, together with the said sum so given by the said commissioners, and which new church was then and there duly consecrated by the bishop of Lichfield and Coventry, then being the ordinary of the said parish; that, after the said new church was so built as aforesaid, to wit, on the 12th of November, 1831, the said Nathaniel Hinde died, without having previously avoided or resigned his said living; whereupon, and by virtue of the provisions of the said act of parliament, the said new church then became the principal or mother church of Kingswinford aforesaid, and the then church became such chapel as in the said act mentioned, and which same chapel then acquired, and from thenceforth and continually had been called and known by, the name of the chapel of St. Mary, Kingswinford, and the patronage of and right of presentation to the same chapel, as well as the patronage of and right of presentation to the said new church, then and there became and was vested in the said Viscount Dudley and Ward, and his heirs, he the said Viscount Dudley and Ward then being the patron of the said rectory of Kingswinford, and he the said Viscount Dudley and Ward thereupon became and was seised as of fee of and in the said advowson, right of patronage and presentation, as in the second count of the declaration above alleged; that the said Earl of Dudley, by his said last will and testament in the second count of the declaration mentioned, so signed, &c., as therein mentioned, gave and devised the said advowson and right of presentation to the chapel of St. Mary, Kingswinford, aforesaid, after the determination of the said term of ninety-nine years, and immediately after the decease of the said W. H. Ward, to William Ward, the eldest son of the said W. H. Ward, for his natural life. [The plea *then proceeded as in the first plea, *683] from the asterisk to the end.]

To these pleas, the attorney-general, on behalf of the Crown, demurred generally. The objection relied on was, "that the chapel of St. Mary's, Kingswinford, appeared by the declaration to be *presentative*, and that, therefore, the right of presentation, on the vacancy set out in the counts respectively, would lapse to the Crown, notwithstanding the defendant Richard Foley might have been nominated by the patron, and licensed by the ordinary." The defendant joined in demurrer.

Talfourd, Serjt., for the Crown. The question is, whether, upon the proper construction of the act of parliament set out in the declaration, (a) the chapel of St. Mary's, Kingswinford, was donative or presentative; or whether, supposing it to have been originally donative, it did not cease to be so, and become presentative, by the presentation, institution, and induction of Mr. Cartwright, upon the avoidance of Mr. Hinde.

That this is a chapel that *might be* presentative, is clear, upon all the

(a) 7 G. 4, c. 41, (private act.)

old authorities. In Co. Litt. 344 a, it is said: "A church parochial may be donative and exempt from all ordinary jurisdiction, and the incumbent may resign to the patron, and not to the ordinary; neither can the ordinary visit, but the patron, by commissioners to be appointed by him. And, by Littleton's rule, the patron and incumbent may charge the glebe; and, albeit it be donative by a layman, yet *merè laicus* is not capable of it, but an able clerk *infra sacros ordines*, is; for, albeit he come in by lay donation, and not by admission or institution, yet his function is spiritual: and, if such a clerk donative be disturbed, the patron shall have a *quare impedit* of this church *donative, and the writ shall say, *quod per-mittat ipsum præsentare ad ecclesiam*, &c., and declare the special [684 matter in his declaration.(a) And so it is of a prebend, chantry, chapel, donative, and the like; and no lapse shall incur to the ordinary, except it be so specially provided in the foundation. But, if the patron of such a church, chantry, chapel, &c., donative, doth once present to the ordinary, and his clerk is admitted and instituted, it is now become presentable, and never shall be donative after, and then, lapse shall incur to the ordinary, as it shall of other benefices presentable." So, in 2 Inst. 364, it is said, "if a patron of a chapel present unto it by the name of a church, and the clerk be instituted and inducted thereunto, &c., it hath lost the name of a chapel." The distinction between donatives and presentatives is very clearly laid down in Gibson's Codex, tit. 34, c. 10, s. 2: (b) "Donatives," it is there said, "are so called, because they are given, and fully possessed, by the single *donation* of the patron, in writing, without presentation, institution, or induction. And the right in the donor (together with the exemption of the church from ecclesiastical jurisdiction) spring from the consent of the bishop to some particular lords and great men, who were desirous to erect places of worship for the convenience of their families, and did obtain those privileges for them and their heirs; in regard (as I suppose) that the places at first were considered only as *private domestic chapels*. And, as the families, and by consequence the neighbourhood, increased or decayed, the places, in process of time, became *churches*, and *chapels with cure*, or *sine cure*. For, that a benefice with cure of souls, may be donative, appears from the rectory of St. Burien, in Cornwall, and the church in the Tower of London, which are both cures, and both *donatives. But, if these, and the like places, had been *originally intended* for distinct cures of souls, and not as places of private [685 worship only, it is not to be conceived that the bishops should grant them such privileges and exemptions: since the utmost favour that was granted to the founders or endowers of churches (though intended only for their own tenants) was only the right of patronage. From whence it may be inferred that those grants of independence, made to the churches and chapels called donatives, were in consideration of their being at first of a merely *private and domestic* nature." In Blackstone's Commentaries,

(a) Vide post, §97, n.

(b) Vol. ii. p. 819.

vol. ii. pp. 23, 24, it is said: "An advowson donative is, when the king, or any subject by his license, doth found a church or chapel, and ordains that it shall be merely in the gift or disposal of the patron; subject to his visitation only, and not to that of the ordinary; and vested absolutely in the clerk by the patron's deed of donation, without presentation, institution, or induction. This is said to have been anciently the only way of conferring ecclesiastical benefices in England; the method of institution by the bishop not being established more early than the time of Archbishop Becket, in the reign of Henry II. And, therefore, though Pope Alexander III., in a letter to Becket, severely inveighs against the *prava consuetudo*, as he calls it, of investiture conferred by the patron only, this, however, shows what was the then common usage. Others contend that the claim of the bishops to institution is as old as the first planting of Christianity in this island; and, in proof of it, they allege a letter from the English nobility to the Pope, in the reign of Henry III., recorded by Matthew Paris, which speaks of presentation to the bishop as a thing immemorial. The truth seems to be, that, where the benefice was to be

*686] conferred on a mere layman, he was first presented to the bishop, in order to receive ordination, who was at liberty to examine and refuse him: but, where the clerk was already in orders, the living was usually vested in him by the sole donation of the patron, till about the middle of the twelfth century, when the Pope and his bishops endeavoured to introduce a kind of feudal dominion over ecclesiastical benefices, and, in consequence of that, began to claim and exercise the right of institution universally, as a species of spiritual investiture. However this may be, if, as the law now stands, the true patron *once* waives this privilege of donation, and presents to the bishop, and his clerk is admitted and instituted, the advowson is now become for ever presentative, and shall never be donative any more. For, these exceptions to general rules and common right, are ever looked upon by the law in an unfavourable view, and construed as strictly as possible. If, therefore, the patron in whom such peculiar right resides, does once give up that right, the law, which loves uniformity, will interpret it to be done with an intention of giving it up for ever; and will thereupon reduce it to the standard of other ecclesiastical livings." By the act of parliament in question, the old parochial church of Kingswinford is made a mere chapel of ease, the new church being created the mother church. There is nothing on the face of the act, nor can any reason be assigned, why the new chapel should not be presentative, as the old church was, and as the newly built church is to be for the future. The fair inference from the whole of the act is, that there should be uniformity in this respect. [MAULE, J. The act, in the case of the old church, provides, "that the minister shall not be removable at pleasure." That probably was introduced from mere ex-

*687] cess of caution.] There are many authorities to show, that, where the patron presents, and his clerk is instituted and *inducted,

though the benefice was donative before, it, by the single act of presentment, loses its donative character, and becomes for ever after presentative. In *Fairchild v. Gayre*, Cro. Jac. 63, Yelv. 60, 1 Brownl. & G. 202, the whole court held that "admission and institution is not requisite in case of a donative; but, if to such a donative the patron presents to the ordinary, and suffers an admission and institution thereupon, he thereby hath made it always presentable." [TINDAL, C. J. The authority cited for that, is Co. Litt. 344 a. There is also a reference to F. N. B. 35 E.] In Gibson, tit. 9, c. 11, s. 4, it is said: "If the patron of a chapel do *present* to that chapel, it shall become a church, and be *presentative*. This was affirmed by Doderidge, and assented to by Coke, in the court of King's Bench, 12 Jac. 1, agreeably to what is said elsewhere of *donatives*, that, if the patron present, and his clerk is admitted and instituted, it is become *presentable*, and never shall be *donative* after. But, on the other hand, if one is patron of two churches, and presents to one only as the mother church, *cum capellâ de*, (naming the other;) that other, having been *originally* a district parish church, shall so remain, notwithstanding such presentment, and that never so often repeated." Again, tit. 34, c. 10, s. 5, p. 820: "If the *patron* of a donative doth *present* to the ordinary, and suffer admission and institution thereupon, it is no longer *donative*, but for ever *presentative*, and liable to lapse, and subject to the jurisdiction of the ordinary. In this doctrine the books (a) are agreed, without exception even to the Crown; but with one other exception, (in which they likewise agree,) that such presentation must be made by the *true* patron; for, if it be by a stranger, it is so far from making the church **presentative*, that it is in itself merely void. And there seems to be the [688 same reason for a perpetual curacy's becoming for ever presentative, if the true patron, instead of nominating, shall present, and suffer admission and institution as aforesaid, because, if presentation in the case of a donative doth not only create a *perpetual* obligation to present, but also hath force enough to extinguish the original exemption from the ordinary, much more may it create such obligation in places that are, and always were, subject to the jurisdiction of the ordinary. GIBSON then refers to a case of *Ladd v. Widdows*, 2 Salk. 541, S. C. Lord Holt, 259, which will probably be cited for the defendant; but he does not adopt it as an authority. [TINDAL, C. J. That, in all probability, was the case of a donative created by the crown.] (b) In Watson's Clergyman's Law, c. 15,

(a) Citing 1 Inst. 344 a, Cro. Jac. 63; *Fairchild v. Gayre*, Style, 272; *Cremor v. Burnet*, 2 Style's Rep. 266. And see 8 Ass. fo. 18, pl. 29.

(b) In the two reports of this case—which are verbatim the same, except that in Holt the name of Serjt. Selby is omitted—Holt, C. J., and Powell, J., are stated to have held that a presentation could not destroy a donative "because its creation was by letters-patent, whereby land is settled to the parson and his successors, and he to come in by donation." In that case, as suggested, the benefice was perhaps a donative created by letters-patent. But the opinion may have been extra-judicial; the case stating that there was evidence of several *pretended* presentations, the new trial was probably moved for in respect of the insufficiency of that evidence.

p. 170, it is laid down, that, "though generally these donatives be in themselves to be had only by the patron's collation, yet, if the true patron of such a donative doth once present to the ordinary of the respective diocese, and doth suffer admission and institution thereupon, he thereby hath made it always presentable; (a) and hath made it also for ever to become a benefice with cure of souls. (b) And this holds not only in the case of common patrons of donatives, but in the case of the king also." (c)

*689] *[TINDAL, C. J. That is at variance with *Ladd v. Widdows* : and certainly there is nothing repugnant to good sense in holding that the character of the right may be thus changed. MAULE, J. *Ladd v. Widdows*, when closely looked at, will be found to be no authority at all. If there had been evidence given of presentation, institution, and induction, it would have been distinctly so alleged. Simple presentation will not do, without institution and induction : that is in accordance with all the authorities.] (d) Watson says, p. 173 : "It has been generally held for law, that, if the patron of a donative doth once present to the ordinary, and suffer an admission and institution thereupon, the church, &c., is no longer donative, but shall be, for ever after, presentative, and liable to lapse, and in all things subject to the jurisdiction of the ordinary; in which doctrine the ancient books seem to agree, without exception even to the crown. Yet there are later authorities which say, though a presentation may destroy an impropriation, it cannot destroy a donative, because the creation thereof was by letters-patent, by which the land was settled to such a person and his successors, and he to come in by donation, which was the ancient way of conferring benefices, and the institution to churches was not ordained by any temporal law, there being only a papal provision; and was not received in some places here in England, and where it was not received, they still went on in the old way and method of conferring benefices, which afterwards were called donatives." [TINDAL, C. J., referred to 3 Salk. 140, tit. *Donative*.] These authorities clearly *690] show that the *donative character of the living in question,—if, upon the true construction of the act, it ever was donative,—was destroyed by the presentation of Mr. Cartwright, and his admission and institution, in December, 1831; and therefore the pleas, which allege not a presentation, but a mere nomination and appointment of the defendant Foley, afford no answer to the declaration.

Channell, Serjt., (with whom was *Byles*, Serjt.,) for the defendant. It may be that a donative, properly so called, becomes presentative if the patron once presents, and his clerk is thereupon instituted and inducted :

(a) Citing *Fairchild v. Gayre*, *ubi supra*, and Co. Litt. 344 a.

(b) *Clerk v. Heath*, Mich., 21 Car. 2 B. R., 2 Keb. 556.

(c) By Latch, in his argument in *Cremer and Burnel's case*, Style, 272.

(d) In *Ladd v. Widdows*, presentation is mentioned, and nothing is said of institution or induction. But the distinction taken in that case is, between an impropriation, destroyed by presentation, i. e. *ut videtur*, by presentation attended with its usual consequences, institution and induction, on the one hand, and a donative, not so destroyed, on the other.

but the case of *Ladd v. Widdows* is an authority to show, that, though a presentation may destroy an impropriation, yet it cannot destroy a donative, the creation of which is by letters-patent. The same rule will apply to a donative created by act of parliament. Watson, after referring to all the authorities, takes a distinction between donatives, properly so called, and others. (a) "Some of the instances before mentioned," he says, "may rather be called *quasi donations* than properly donations: such are, 1. The collation of a bishop without any presentation; 2. The grant of the king to prebends, &c., without institution; and, 3. The nomination to perpetual curacies, which is without either presentation, institution, or induction: for, these differ from donatives, properly so called, which are given and fully possessed by the sole donation of the patron in writing, inasmuch as collations and royal grants are to be followed by induction and instalment; and persons nominated to curacies are to be authorized by a license from the bishop before they can legally officiate: whereas possession by donation is not subject to any of these consequents, but receives its full essence and *effect from the single act and sole authority [691 of the donor, as aforesaid; and, if what is said in the case of *Clerk v. Heath* be true, that the king hath several donatives in Wales, which yet receive institution from the bishop, it seems to be as true, that, by such institution, they have lost the proper nature of donatives; (b) for, the grant of a donative, being once made, creates a right as full and lasting as presentation, admission, institution, and induction can, viz., a right not to be divested or taken away but by the resignation or deprivation of the donee, whereof the first must be made to, and the second by, the donor, for, both the church and the clerk are exempt from ordinary jurisdiction. And to this purpose is what we find in Sir John Davis's Reports, viz., that a donative cannot be granted for years, or at will only, because this great inconvenience would follow, that the freehold (of the church, &c.) might be in perpetual abeyance, which is an inconvenience that the law will not suffer. The case of those curacies called perpetual, in opposition to temporary curates, who serve under other incumbents, was originally otherwise, being such churches the entire revenue whereof was united and annexed *ad mensas monachorum*, and not (as other appropriations were) under the tie of having perpetual vicars appointed in them, but left to be served by temporary curates belonging to their own houses, and sent out as occasion required. The like liberty of not appointing a perpetual vicar was sometimes granted, by dispensation, in benefices not annexed to their tables, in consideration of the poverty of their *house, [692 or the nearness of the church. But, when such appropriations, to-

(a) Title *Donation and Donative*, c. 15, p. 172.

(b) The distinction possibly may be this: the king, by *presenting* to the ordinary, does an act by which he releases his right of collating (or giving) without presentation; but where he collates (or gives) without presenting, his rights are not affected by mere *laches*, which cannot be imputed to the crown in suffering the collatee (or donee) to receive institution and induction.

gether with the charge of providing for the cure, were transferred from spiritual societies to single lay persons, who were not capable of serving them by themselves, and who, by consequence, were obliged to nominate some particular person to the ordinary, for his license to serve the cure, the curates by this means became so far perpetual as not to be wholly at the pleasure of the appropriator, nor removable but by a due and legal revocation of the license of the ordinary." All the authorities cited on the part of the crown apply to donatives, strictly and properly so called; and all rely on the passages cited from Co. Litt. 344 a. The old church having, by the plain words of the act, been converted into a mere chapel of ease without cure of souls, the question is, whether the mere use of the word "presentation" in the preamble and in the enacting part of the act of parliament, takes this case out of the ordinary rule, that a mere nomination is all that is necessary. The word is evidently not used in its strict legal sense, but merely to point out the person by whom the patronage is to be exercised. The church-building acts, 58 G. 3, c. 45, ss. 18, 19, and 59 G. 3, c. 134, s. 13, show that the legislature knew how to express themselves, where they intended to make benefices presentative. The authorities cited on the other side do not bear out the proposition that one presentation, in the case of a donative, renders the benefice for ever after presentative: when looked at, they will be found all to apply to churches or chapels having cure of souls. A mere chapel of ease is scarcely recognised by the law. The case of *The King v. The Bishop of Chester*, 1 T. R. 396, *Bliss v. Woods*, 3 Hagg. 486, and *William v. Brown*, 1 Curt. 54, may afford some assistance in the determination of this question.

*693] *Talfourd*, Serjt., was heard in reply.

TINDAL, C. J. The real question in this case appears to me to be, whether, upon the true construction of the act of parliament, this chapel, which before was the old parochial church of Kingswinford, is a donative, to which the patron may appoint, without presenting his clerk to the ordinary, or whether it is presentative only, as is contended on the part of the crown. Looking at the general scope and object of the act, it appears to me that it is presentative only. The object of the act appears to have been this: part of the glebe land having mines under it, which might be worked with advantage if in lay hands, it provided for the sale thereof if a purchaser could be found; and, accordingly, the patron enters into a contract with the incumbent, that a certain portion of the land shall be sold to the former for the sum of 19,290*l.* 11*s.* 3*d.*, and that, after payment of certain expenses, the remainder of the purchase-money shall be considered and taken as part of the rectory, that, after defraying thereof the expenses of erecting a new rectory house and outbuildings, and setting apart a sum not exceeding 1929*l.* 1*s.*, to be applied towards the erection of a new church, the final residue shall be invested for the benefit of the rectory. The act then provides, that, in case such new church shall be built by the means and within the time specified, the curate or

officiating minister thereof, who shall, during the life or incumbency of Mr. Hinde, the then rector, be *appointed* by him to act during his life or incumbency, shall be paid or allowed the sum of 100*l.* *per annum*, over and above the pew-rents of the new church. The act then goes on to provide for the enjoyment of the future patronage, in these words: "And from and after the death, avoidance, or *resignation of the said N. Hinde, the said new church shall become the principal or mother church of Kingswinford aforesaid, with all the accustomed rights, immunities, and privileges appertaining to a mother church, and the then church shall become and be deemed a chapel of ease thereto, to be served by a minister capable of having cure of souls; and the *patronage of or right of presentation to the same chapel, as well as the patronage of or right of presentation to the said new church*, shall be vested in Lord Dudley and Ward, his heirs and assigns, patron and patrons of the said rectory of Kingswinford, so, nevertheless, that the minister of the said chapel shall not be removable at pleasure." These are the important words, to which we are now called upon to give a construction. What is the meaning of the words, "the patronage of or right of presentation to the same chapel, as well as the patronage of or right of presentation to the said new church, shall be vested in Lord Dudley and Ward, his heirs and assigns?" The same words are applied equally to the old church and to the new chapel of ease: and it seems to me to be very difficult to put a different construction upon them in the one case from that which is put upon them in the other. And this remark is the more striking when the earlier part of the clause, where it is provided that the curate or officiating minister of the newly built church shall, during the life or incumbency of Mr. Hinde, the then rector, be *appointed* by him to act during his life or incumbency. If the legislature had intended the creation of a donative, it would be somewhat singular that they should, when dealing with the future patronage, drop that word, and adopt a form of expression applicable to a totally different state of things, viz., "right of presentation." (a) This view is still further *confirmed by a consideration of the nature and the mode of creation of donatives. In Co. Litt. 344 a, [*695 it is said: "If the king doth found a church, hospital, or free chapel donative, he may exempt the same from ordinary jurisdiction," &c. Again, "As the king may create donatives, exempt from the visitation of the ordinary, so he may, by his charter, license any subject to found such a church or chapel, and to ordain that it shall be donative, and not presentable, and to be visited by the founder, and not by the ordinary; and thus began donations in England, whereof common persons were patrons." If, therefore, this were intended to be a donative, one would expect to find some words of special exemption. In the ordinary case of a donative, the original deed would be presumed to be lost; but then there

(a) Vide post, 697, n.

would be the circumstance of the donee never having been presented to the bishop. But here, we have the very act creating the living, and, if it were exempted from ordinary jurisdiction, some words of exemption would undoubtedly be found. I was at first inclined to attach some importance, in favour of the defendant's argument, to the words that declare "that the minister of the said chapel shall not be removable at pleasure." But I think those words were merely introduced *ex majori cautela*, lest the previous words should be construed to render the officiating minister appointed by Mr. Hinde during his incumbency, removable at his pleasure. Upon the whole, the true construction of the act appears to me to be, that the chapel of ease is presentative by the patron of the living of the parish; and this construction is in some degree fortified by the circumstance that, the only instance that has occurred since the avoidance of Mr. Hinde, is of a presentation. I therefore think there should be judgment for the crown.

*696] *MAULE, J. I am of the same opinion. It is not necessary to discuss whether a single instance of presentation by the patron would have the effect of making a benefice presentative which before was donative. My own opinion is that it would have that effect. It is not necessary, however,—nor is it possible,—to decide that in the present case, because I think this benefice was *originally* presentative. That it was so, appears from indisputable evidence. The act of parliament provides in the same words for the future presentation to the new mother church and to the old church now made a chapel of ease; and the same words in the same clause of an act ought always to be construed in the same sense, when applied to the same or a similar subject-matter, unless any necessity exists for giving them a different construction. No such necessity exists here. In the present case, the living was presentative before the passing of the act: and, although a considerable change has been effected in the parish, the presentative character of the living must remain, unless altered by the express words of the act. I conceive ecclesiastical benefices generally are to be taken to be presentative, unless there be some evidence expressly showing them to be donative, and exempted from ordinary jurisdiction: and I can find nothing in this act to show that this chapel is so exempted. On the contrary, I think there are circumstances to show that it falls within that description of benefices that are the proper subject of presentation. There is, at all events, nothing in the act to exempt it from the characteristics that ordinarily belong to ecclesiastical benefices.

CRESSWELL, J. I also am of opinion that the benefice in question is to be considered as presentative; and therefore that the church is not full,
*697] there having *been no presentation. It cannot be contended that the officiating minister of the church is to be considered as a mere curate. It might have been so contended, possibly, during the incum-

ency of Mr. Hinde ; for, he is so called in the act.(a) But, on the death of that gentleman, this change took place :—A large sum of money had been produced by the sale of a portion of the glebe, which sum, by the terms of the act, was to be, in part, appropriated to the building of a new rectory-house, and, in part, to the erection of a new church in the parish ; and the residue was to be invested by the patron and ordinary, in land for the benefit of the then rector during his life or incumbency, and, on his death or resignation, for the benefit of the minister of the old church, which was by the act made a chapel of ease to the new church ; which latter then became the mother church. It is difficult to conceive how the ordinary could have any thing to do with the investing of this money, if the chapel of ease were to be a mere curacy, or even a donative. The new incumbent is to be a person “capable of having cure of souls.”

The construction we put upon the act of parliament, relieves us from the necessity of considering, whether the older authorities are, in any degree, disturbed by the case of *Ladd v. Widdows*.

ERLE, J. As stated in the course of the argument, the legislature have known how to express themselves, when it was thought desirable to make benefices presentative, and had it been intended that this living should be filled by appointment only, without presentation to the bishop or ordinary, that intention would have appeared in this act. For the reasons assigned by the rest of the *court, I am of opinion that this was [*698 not a donative in its original creation.

Judgment for the crown.(b)

(a) *Quare*, if, in the act, the term “curate” is not used, as in the Liturgy, in its original and proper sense of “person having the cure of souls.” *Curatus, curio, sacerdos ecclesiam, curat.*

(b) In strict legal language all benefices are *presentative*, *præsentare ad ecclesiam*, or *ad capellam*, or *ad cantariam*, meaning nothing more than to nominate or appoint a minister or pastor to the vacant church, chapel, or chantry. Throughout the forms of writs of *quare impedit* in the Register, (Reg. Brev. Orig. 30, 31,) the mandatory clause runs thus :—*quod permittat predictum (querentem) præsentare ad ecclesiam (capellam or cantariam)* without any special form for a donative : under this general writ, the plaintiff may count either upon an ordinary right of presentation,—which is to, or rather through, the bishop,—or upon the exceptional right of direct absolute presentation, called a donation. F. N. B. 33, C.

In the reign of Mary, Dyer, J., (afterwards C. J. of C. P.,) is said to have paid “an acceptable compliment to the queen’s attachment to the interests of the church,” by *presenting* to, and thereby disappropriating his vicarage of Staplegrove, near Taunton. See Strype’s *Annals of the Reformation*, vol. ii. p. 370; *Life of Dyer*, prefixed to his Reports.

DALRYMPLE v. FRASER and DAWES. Jan. 31.

A warrant of attorney executed by two persons, authorizing attorneys to appear "for us and each of us," and to receive a declaration "for us and each of us" in an action of debt, &c., and, after judgment entered up, "for us and in our name, and as our act and deed," to execute a release of errors, &c., is *joint only*, and not *joint and several*.

DOWLING, Serjt., on a former day in this term, obtained a rule nisi for leave to enter up judgment against the defendant Dawes upon a warrant of attorney given by the defendants in the following form:—

"To — and —, attorneys of her majesty's court of Common Pleas at Westminster, jointly and severally, or to any other attorney of the same court.

"These are to desire and authorize you, the attorneys above named, or any one of you, or any other attorney of, &c., to appear in the same court *for us and each of us*, H. Frazer, and W. Dawes, and then and *699] there to receive a declaration *for us and each of us*, in an action *of debt for the sum of 130*l.* for money borrowed, at the suit of Elizabeth Dalrymple; and thereupon to confess the same action, or else to suffer a *judgment* by *nil dicit*, or otherwise, to pass against us in the same action, and to be thereupon forthwith entered up *against us and each of us*, of record of the said court, for the said sum of 130*l.*: and we the said H. Frazer and W. Dawes do hereby further authorize and empower you, the said attorneys, or any one of you, after the said judgment shall be entered up as aforesaid, *for us and in our name*, and as *our act and deed*, to sign, seal, and execute a good and sufficient release in the law to the said E. Dalrymple, her heirs, executors, and administrators, of all and all manner of error and errors," &c. &c.

Byles, Serjt., now showed cause. The warrant of attorney is *joint*, and the application should have been, for leave to enter up judgment against both the defendants, and not against one alone. It contemplates but *one* action, *one* declaration, and *one* judgment. In *King v. Hoare*, 13 M. & W. 494, PARKE, B., says: "The distinction between the case of a joint and several contract is very clear. It is argued that each party to a joint contract is severally liable; and so he is in one sense, that, if sued severally, and he does not plead in abatement, he is liable to pay the entire debt; but he is not severally liable in the same sense as he is on a joint and several bond; which instrument, though on one piece of parchment or paper, in effect, comprises the joint bond of all, and the several bonds of each, of the obligors, and gives different remedies to the obligee. Another mode of considering this case is suggested by BAYLEY, B., in the case of *Lechmere v. Fletcher*, 1 Cr. & M. 634, and was much discussed during *700] the argument, and leads us *to the same conclusion. If there be a judgment against one of two joint contractors, and the other is sued afterwards, can he plead in abatement or not? If he cannot, he

would be deprived of a right by the act of the plaintiff, without his privity or concurrence, in suing and obtaining judgment against the other." In *Gee v. Lane*, 15 East, 592, a warrant of attorney authorized the attorneys "to appear for us, J. L. and W. G., and to receive a declaration for us in an action of debt," &c. And Lord ELLENBOROUGH said: "'An action to be brought against us' must mean a joint action. In the case cited, (*Gladwin v. Scot*, Barnes, 53,) the warrant of attorney executed by two, was, to enter judgment against me, which, construed severally, might serve the purpose; but I am afraid that an authority by two, to enter judgment in an action against us, will not warrant a judgment against one alone.(a) The authority must be pursued: we cannot violate it." So, in *Row v. Alderson*, 7 Taunt. 453, it was held, that, if two give a warrant of attorney to confess judgment against them, and one dies, judgment cannot be entered up against the other. The case would have been very different if the words of the authority had been, to enter up judgment against "us or each of us."(b)

Dowling, Serjt., in support of the rule. The cases cited have no bearing on this. The instrument in question is, undoubtedly, both joint and several. The words "and each of us" are not to be rejected as surplusage. The only doubt arises from the omission of the words "and each of us" at the end of the warrant of attorney; but that alone will not vary the meaning, if otherwise clear. [ERLE, J. I cannot discover any thing in this instrument to warrant us in construing it severally: it *is clearly joint when it comes to that part which speaks of entering up judgment.] The authority would justify an appearance for one, and the receipt of a declaration for one. The entire instrument must be so read, as to give to the whole, if possible, a sensible construction. In the case of wills as well as of other instruments, "each" has been held a word of severance: *Kew v. Rouse*, 1 Vern. 353, where a devise of a term to A. and B., paying 25l. a year out of the rents to one during his life, viz. 12l. 10s. to each of them, was held to be a tenancy in common. So, the word "and" may, if necessary, be read "or:" *Swift v. Gregson*, 1 T. R. 432. And words may be transposed, or supplied by the court, to comply with the intent of the testator: per Lord HARDWICKE, in *Brownswood v. Edwards*, 2 Ves. sen. 248.

TINDAL, C. J. The question is, what is the predominant intention of the parties to be collected from this warrant of attorney. At the beginning, certainly, they authorize the attorneys to appear and to receive a declaration "for us and each of us." Thus it clearly appears that they knew the use of words that are joint and several. But when they come to the more important part of the instrument, viz., that part which authorizes the confession and entry of a judgment, the language employed is joint only; it authorizes a judgment to be entered up "against

(a) And see Co. Litt. 258 a.

(b) Which might be construed to mean "or either of us."

us and each of us." One action and one judgment only are contemplated.

CRESSWELL, J.(a) I also think that the language of this instrument excludes the entering up of judgment against one of the parties only.

ERLE, J. The language is joint throughout: there are no words of severance.

Rule discharged, without costs.

(a) Maule, J., was absent.

*702] *HEALY v. YOUNG and Another. Jan. 30.

Upon a motion, on the part of the defendants, for a commission to examine witnesses abroad. it was required that it should appear, to the satisfaction of the court, upon an affidavit from their attorney, that the evidence of the witnesses proposed to be examined was material and necessary to the defence of the action.

ASSUMPSIT against two of the directors of The New Zealand Land Company upon the alleged breach of a contract for the sale to the plaintiff of land in New Zealand. The writ was issued on the 28th of May, 1845. The cause being at issue, and notice of trial given for the last assizes at Bristol, the defendants, on the 15th of August, obtained a commission for the examination of witnesses in New Zealand. This order was obtained upon the affidavit of *one of the defendants*, which stated that William Wakefield, of the city of Wellington, in New Zealand, and several other persons residing in New Zealand, and out of the jurisdiction of this court, whose names were unknown to the deponent, were material and necessary witnesses for the deponent and his co-defendant under the issues joined in the cause, as he the deponent was advised and verily believed; and that the deponent and his co-defendant could not safely proceed to the trial thereof without the testimony of the said William Wakefield and the said several persons. The plaintiff, on the 16th, took out a summons to rescind that order, upon a suggestion that it had been improperly obtained behind the back of his attorney, and after an intimation from the judge that the affidavit was insufficient. On the 19th, an order was made by WIGHTMAN, J., rescinding the order for a commission for the examination of witnesses made by him on the 15th, "without prejudice to the defendants' applying next term to the court for a commission; the cause not to be tried at the then assizes for Bristol, but the plaintiff to be at liberty to change the venue to London or Middlesex."

*703] *Sir T. Wilde, Serjt., in Michaelmas term last, accordingly obtained a rule nisi for a commission, upon an affidavit by the defendant Young, which stated that the alleged breaches of contract took place in New Zealand; that the company despatched to New Zealand, in the month of August, 1839, a body of surveyors, under Captain W. M. Smith, of the royal artillery, as surveyor-general, and R. Park R. Stokes,

and W. Carrington, as assistants of the said surveyor-general; that the deponent had been informed, and verily believed, that Captain Smith and the other persons named, had been since occupied in the survey of the company's territory in New Zealand, and were then resident in New Zealand, and were not expected to return thence to England for a considerable time, or before the trial of this cause; that the said Captain Smith and the other persons named, together with William Wakefield, of the city of Wellington, in New Zealand, and several other persons residing in New Zealand, and out of the jurisdiction of the court, whose names were unknown to the deponent, were material and necessary witnesses for the deponent and his co-defendant, under the issues joined in this cause, as he the deponent was advised and verily believed; that the deponent and his co-defendant could not safely proceed to trial without the testimony of Captain Smith, the other parties named, and the said several persons; and that the application was *bond fide*, and not made for the purpose of delay.

Byles and *Wilkins*, Serjts., now showed cause, upon affidavits suggesting that there were witnesses in England who could prove all that the parties referred to in Young's affidavit could be expected to prove—giving the names of a great number of persons, some of whom had been in the employ of the company as surveyors and agents, and the rest holders of land in the colony *under them. They submitted that the affidavit upon which the rule was obtained did not show sufficient [704 ground for the issuing of a commission, which would, under the circumstances, be an absolute denial of justice to the plaintiff; that there was no affidavit of merits; (a) and that, at all events, there should have been an affidavit *by the defendant's attorney* that the evidence of the proposed witnesses was material and necessary for their defence to the action, and that it was admissible: and they referred to the case of *Lloyd v. Key*, 3 Dowl. P. C. 253, where, upon an application for a commission to examine witnesses in Upper Canada, PARKE, B., said: "Where a witness resides at such a great distance as the witness does in the present instance, it ought to be clearly made out, to the satisfaction of the court, not only that the evidence which the witness is expected to give is material and necessary, but that it is admissible."

Sir T. Wilde, Serjt., in support of the rule. It has been the universal practice to grant commissions upon the affidavit of the *party* himself. The affidavit here is framed in the terms usually adopted; and, in the absence of a positive rule on the subject, the court will not permit the motion to be defeated upon such an objection, the only effect of which would be to drive the defendants to an application to a court of equity, where the commission would be granted as a matter of course, but at considerable expense. Besides, although the attorney knows what the issues are, he

(a) This is not necessary. See *Baddeley v. Gilmore*, 1 M. & W. 55, Tyrwh. & Gr. 369, Gale, Exch. 410.

can know nothing of the means of proof but by the information of his client. Young, having been one of the directors, is the person who, of all others, is most likely to be well informed as to the transactions of the company.

*705] *TINDAL, C. J. It is impossible to come to any other conclusion than that this is a case in which the defendants ought to be allowed to have a commission for the examination of witnesses as proposed, and that they ought not to be compelled to select their evidence from the persons named in the plaintiff's affidavit. But I think the commission ought not to go until we are furnished with an affidavit of the defendant's attorney, showing that the evidence to be given by the persons it is proposed to examine under it, is material and *necessary* to the defence of the action.

MAULE, J. Subject to the affidavit suggested by the lord chief justice, I also think the commission ought to go. In such a matter as this, where the court are to be convinced of the necessity for a commission, I do not think any precise form of affidavit could conveniently be prescribed. The sufficiency of the materials must depend upon the nature and peculiar circumstances of each case, regard being had to the means of knowledge and information possessed by the deponent. It is not matter of mere fact that is to be sworn to, but matter of judgment and opinion.

CRESSWELL, J., and ERLE, J., concurred.

The required affidavits having been afterwards produced, the court made the
Rule absolute.

*706] *MARTINDALE v. MARY FALKNER and Two Others.

Jan. 28.

An attorney's bill must show the court and the cause in which the business referred to in it, or the greater part thereof, was done. These particulars should be expressly stated, (held to be *necessary* by Maule, J.,) or must be capable of being collected by fair and reasonable intendment from the nature of the several items of charge.

Where costs are incurred in a suit, the statute of limitations does not begin to run against the earlier items until the suit is terminated.

DEBT, for work done as an attorney and solicitor, and for money found due upon an account stated.

Pleas—first, never indebted—secondly, that the several causes of action in the declaration mentioned did not, nor did any of them, or any part thereof, accrue to the plaintiff at any time within six years next before the commencement of the suit, &c.—thirdly, payment before action—fourthly, that the plaintiff, before and at the time of the doing of the said work, and of the providing of the said materials, as in the first count mentioned, was an attorney and solicitor, and the said work was done, and the said materials were provided by him as such attorney and solicitor, and the

said fees and causes of action in the first count mentioned were and are for fees, charges, and disbursements for business done by the plaintiff for all the three defendants as such attorney and solicitor as aforesaid; and that the money so found to be due as in the last count mentioned, was due, and found to be so, for and in respect of the said work and materials, and for and in respect of the said fees, charges, and disbursements, and not otherwise, and that the said account was stated as aforesaid of and concerning the same, and of and concerning no other cause and matter; and that no bill of the said fees, charges, or disbursements, or of any of them, or any part thereof, subscribed with the proper hand of the plaintiff, or with the proper hand of any assignee of the plaintiff, was, at any time before the commencement of the suit, delivered unto the defendants, or any of them, or sent by the post to, or left for, the defendants, or any of them, at their counting-house, office of business, dwelling-house, or last known place of abode, or at the counting-house, &c. of any of them; nor was any bill of the said fees, charges, and disbursements, or of any of them, or any part thereof, at any time before the commencement of the suit, delivered to the defendants, or to any of them, or sent by the post to, or left for, them, or any of them, at their counting-house, &c., or at the counting-house, &c., of any of them, enclosed in and accompanied by a letter subscribed with the proper hand of the plaintiff, or with the proper hand of any assignee of the plaintiff, referring to such bill, as required by, and according to, the statute in such case made and provided—verification. [*707]

The plaintiff joined issue upon the first plea, and traversed the others; upon which traverses respectively, the defendants joined issue.

The cause was tried before MAULE, J., at the last summer assizes at Northampton. The plaintiff put in the retainer under which he had acted as solicitor for the defendants, and which was in the handwriting of one of the defendants, and signed by the three, and was addressed to the plaintiff in the following form:—

“In Chancery.

“*Falkner v. Bolton* and others.

“*Falkner v. Cambray* and others.

“*Falkner v. Matthews*.

“Sir,—We retain you as our solicitor, and request you to take such proceedings as will tend to a speedy and amicable arrangement of these suits, as to you shall seem best, with our approbation, and Mr. R. Ridgway’s. Dated, this 31st of December, 1835.”

The bill, a signed copy of which was proved to have been duly delivered, was then put in, &c. It commenced without the mention of any court or cause, as follows: £ s. d.

*708] “1835, Dec. 22. Attending on you, conferring and advising as to your *suits in Chancery*, and as to the order for dismissal, &c., when you left me the papers to peruse, and promised to call to-morrow - - - 0 6 8

£ s. d

" 23. Attending you, conferring and advising further on your affairs, and explaining to you the mode in which I thought you might be reinstated before the court, when it was decided that you should bring me a retainer on Saturday next	0	6	8
" 24. Perusing decrees and reports at Report office, and sundry other papers intrusted by you to me, and paid	1	7	6
" 29. Attending this morning on Mr. Ridgway, discussing your suits, and the best mode of proceeding with him, and again on you this evening, when it was decided that I was to see Mr. Ridgway again with you to-morrow	0	6	8
" 30. Attending Mr. Ridgway, conferring and advising further on your affairs, and as to your wish to borrow 30 <i>l.</i> , &c.	0	6	8
" 1836. March 16. Attending at Six-Clerks' office, searching for record, and paid	0	9	8

Under the heading "Hilary term, 1836. *Falkner v. Matthews*,"—which was the first mention of the name of any suit,—were, amongst others, the following items :—

" Paid for minutes of decree	0	5	0
" Close copy	0	2	6
" Feb. 8. Attending registrar to settle minutes ; but he declined, in consequence of the insertion that rests were to be taken as a matter of course, not being authorized by the court	0	13	6
*709] " Copy title of cause, and prayer of bill	0	2	6
" Copy minutes as wished to be settled, for lord chancellor	0	3	0
" 20. Attending court, cause in paper ; ordered to stand over	0	13	4
" March 2. Paid for copy minutes as settled by the court	0	5	0
" Paid for decree	4	16	8
" Attending passing	0	13	4
" Paid entering	0	6	0
" Paid for reference to master in rotation	0	1	0
" Attending	0	6	8
" 18. Instructions for interrogatories	0	13	4
" Paid for master's allowance, and attendance	0	11	8

Under the heading "Hilary term, 1840," were the following :—

" Feb. 13. Warrant to sign report ; copy and service	0	4	6
" Paid for report and transcribing	5	10	0
" Paid for master's signature	1	0	0
" Copy draft report as finally settled, for use of Mr. Bull	2	15	0
" Instructions for exceptions to master's report	0	13	4
" Copy exceptions for master of rolls	0	6	8

	£	s.	d.
" Drawing and engrossing petition for leave to set down cause for hearing on further directions - - - - -	0	6	8

Trinity term, 1840.

" July 17. Attending court on plaintiff's exceptions - - -	0	13	4
" Attending court on defendant's exceptions - - -	0	13	4
" Attending court on cause - - - - -	0	13	4

*710] *The like on the 18th, 20th, and three following days.

Michaelmas term, 1840.

" Attending Mr. Bull, explaining to him the situation the parties were placed in by the decision of the master of the rolls - - - - -	0	6	8
" Paid for order - - - - -	3	10	0
" Attending passing - - - - -	0	13	4

Trinity term, 1841.

" Paid for report, and transcribing - - - - -	1	9	6
" Paid for master's signature - - - - -	0	4	6
" Drawing and engrossing petition to set down cause for hear- ing on further directions - - - - -	0	6	8
" Copy order on further directions, for the master of the rolls	0	3	0
" The like of report - - - - -	0	5	0
" Attending to set down cause - - - - -	0	6	8
" March 15. Attending court - - - - -	0	13	4

Easter term, 1842.

" Paid for registrar's minutes - - - - -	0	1	0
" April 26. Instructions for petition of appeal - - -	0	6	8
" Draft same, and copy - - - - -	0	15	0
" 29. Making copy judgment pronounced by the master of the rolls - - - - -	1	6	8

Michaelmas term, 1842.

" Attending on Mr. Walker, the registrar, altering title of order on further directions, &c. - - - - -	0	7	2
" Attending at the master's office with order so altered, &c.	0	6	8
" Paid for report and transcribing - - - - -	1	13	0
" Paid for master's signature - - - - -	1	0	0
" Attending examining transcript - - - - -	0	6	8
" Paid filing, and for office copy report - - - - -	1	0	4
*711] *Paid for order and copy - - - - -	0	3	6

" Instructions for drawing and engrossing petition to set down cause for hearing on further directions - - -	0	6	8
" Paid presenting same - - - - -	0	19	0
" Copy order - - - - -	0	3	6
" Copy report - - - - -	0	6	0
" Paid for order and entry - - - - -	0	6	0

Easter term, 1843.							£	s.	d.
"Paid for minutes -	-	-	-	-	-	-	0	2	0
"Paid for order, -	-	-	-	-	-	-	3	10	0
"Attending passing	-	-	-	-	-	-	0	6	8
"Paid entering -	-	-	-	-	-	-	0	3	0
"Copy mandatory part, for taxing master -	-	-	-	-	-	-	0	2	6
"Term fee, letters, &c.	-	-	-	-	-	-	0	15	0

The total amount of the bill allowed on taxation, was 638*l.* 8*s.* 3*d.* It appeared that the principal part of the business had been done, in the suit mentioned in the early part of the bill, before the master of the rolls.

It was insisted, on the part of the defendants, that the bill was not duly delivered in compliance with the statutes, inasmuch as it contained no sufficient intimation on the face of it, of the court, or the cause, in which the business, or the greater part thereof, had been done: and, further, that the earlier items, to the amount of 41*l.*, were barred by the statute of limitations.

The learned judge overruled the objections, and directed a verdict for the plaintiff for the amount of the bill, reserving leave to the defendants to move to enter a verdict on the fourth issue, if the court should be of opinion that a proper signed bill had not been delivered; or to reduce the verdict, by the amount of the items accruing more than six years before the commencement of the action.

*712] *Sir T. Wilde*, Serjt., in Michaelmas term last, accordingly obtained a rule nisi. He cited *Lewis v. Primrose*, 13 Law J., N. S., Q. B. 218.(a) [*ERLE*, J., observed as to the second point, that, with reference to costs incurred in one suit, the statute of limitations does not begin to run until the suit is determined.]

Channell, Serjt., (with whom was *G. Hayes*,) now showed cause. The statute 3 Jac. 1, c. 7, s. 1, enacts that "all attorneys and solicitors shall give a true bill unto their masters or clients, or their assigns, for all charges concerning the suits which they have for them, subscribed with their hands and names, before such time as they or any of them shall charge their clients with any the same fees or charges." This clearly does not render necessary the mention of any court or cause. Neither does the 2 G. 2, c. 23, s. 23, in *express terms* require the court, or the title of the cause to be mentioned: it enacts that "no attorney or solicitor, &c., shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements, at law or in equity, until the expiration of one month or more after such attorney or solicitor respectively shall have delivered unto the party or parties to be charged therewith, or left for him, her, or them, at his, her, or their dwelling-house or last place of abode, a bill of such fees, charges, and disbursements, written in a

(a) Since reported 6 Q. B. 265.

common legible hand, and in the English tongue, except law terms and names of writs, and in words at length, except times and sums; which bill shall be subscribed with the proper hand of such attorney or solicitor respectively. And upon application of the party or parties chargeable by such bill, or of any other person in that behalf authorized, unto the said lord high chancellor, *or the master of the rolls, or unto any of [713 the courts aforesaid, or unto a judge or baron of any of the said courts respectively in which the business contained in such bill, or the greatest part thereof in amount or value, shall have been transacted," &c., it shall be lawful for the chancellor, &c., to refer the said bill to be taxed, &c. It is a sufficient compliance with this provision, if there be some fair reference to the title of the cause and the court. In *Lester v. Lazarus*, 2 C., M. & R. 665, Tyrwh. & Gr. 129, PARKE, B., said: "The objection here arises on the statute of G. 2, which requires the delivery, a month before action brought, of such a bill as shall enable the party charged to apply to the court in which the greatest part of the business shall have been done, to have it taxed. Such being the object of that statute, the statement of the court *may* be a necessary part of the bill." But ALDERSON, B., observed: "I do not at present see the necessity for stating the court in which the business was done; it is not expressly required by the statute, and can only be necessary by implication from the provision as to the application to be made to the court for taxation of the bill. But, why may not the fact, in what court the business was done, be ascertained by evidence extrinsic of the bill itself?" It became, however, unnecessary in that case to decide the point, inasmuch as it was one in which no signed bill was required to be delivered.(a) The question again arose in *Lane v. Glenny*, 7 Ad. & E. 83, 2 Nev. & P. 258, but the case was disposed of on the ground that the objection could not be raised under non assumpsit.(b) In *Lewis v. Primrose*, which will probably be relied on for the defendant, neither in the heading nor in any other part of the bill, was any *mention made of any court or cause, nor was there any [714 thing from which it could be inferred that the bill was for business done in any particular court. Here, however, there is enough on the face of the bill to intimate that the principal part of the business was done in a suit of *Falkner v. Matthews*, in the court of Chancery. [MAULE, J. To enable the defendants to ascertain that it is necessary to assume that they have a knowledge of the practice of the court of Chancery. For any thing that appears on the face of the bill, the business may have been done in bankruptcy or lunacy, or in the House of Lords.] The retainer, —which may be referred to in order to aid the defect in the bill, *Taylor v. Hodgson*, 14 Law J., N. S., Q. B., 310,—is headed in Chancery, and contains the names of the several suits in which the business was for the most part done. [TINDAL, C. J. The question is, whether that which

(a) Being before the statute 6 & 7 Vict. c. 73.

(b) R. H. 4 W. 4.

the statute requires, can be made out by fair intendment from the bill itself. MAULE, J. The retainer cannot help you. All that was decided in *Taylor v. Hodgson*, was, that, under the 6 & 7 Vict. c. 73, the want of a signature to the bill is supplied by the signature to a letter enclosing the bill.] In *Williams v. Barber*, 4 Taunt. 806, it was held that a mistake in the date of items in an attorney's bill, which does not mislead, does not vitiate the delivery. CHAMBER, J., said: "The object of the act was that the bill might be capable of being taxed: there is no difficulty in taxing the bill." And GIBBS, J., added: "To say that this business is not described in the bill, because Trinity vacation is written instead of Hilary vacation, would be trifling with the court." [MAULE, J. There, the bill complied, in terms, with the statute in its strictest interpretation.]

*715] Here, the court of Chancery is *sufficiently referred to as the court in which the business was done. *Harris v. Osbourn*, 2 C. & M. 629, 4 Tyrwh. 445, and *Nicholls v. Wilson*, 11 M. & W. 106, are distinct authorities to show, that, where an action is brought by an attorney in respect of business done in a suit, partly within and partly beyond six years from the commencement of the action, the statute of limitations does not attach upon any part of the demand.

Dowling, Serjt., (with whom was *R. Miller*,) in support of the rule. Since the case of *Lewis v. Primrose*, it is essential to the due delivery of an attorney's bill, that the name of the cause and the title of the court in which the business has been done, should distinctly appear. *Lester v. Lazarus* left the point undecided; but PARKE, B., inclined to the opinion that was more distinctly expressed in the subsequent case of *Lewis v. Primrose*. In the latter case, Lord DENMAN, C. J., said: "To hold this bill sufficient, would, in effect, be to repeal the act. The object of giving the information is, to enable the client to take steps to ascertain if the bill is a fair one. It cannot be said that the attorney is giving sufficient information of what the business is, without informing his client of the court in which it has been done." PATTESON, J., said: "There seems no decision expressly in point. In *Lester v. Lazarus*, the question was not directly before the court. The argument for the necessity of mentioning the court, which arises from the power given by the statute of G. 2, to the judge of the court in which the business has been done, to order it to be taxed, is very strong. If the bill does not contain this information, there must be evidence to show where the business has been done; whereas there can be no hardship in stating the court. I agree that the

*716] bill ought to specify both the court and *cause." And WILLIAMS, J., said: "I cannot understand why the title of the court and the name of the cause should be withheld, as the statutes both of James and George are expressly enacted for the convenience of clients. Application for taxation is to be made to the court in which the business has been transacted. It is not, therefore, a violent inference that the court in which it has been transacted, should be mentioned in the bill."

The entire object of the provision would be destroyed by holding that the attorney may abstain from giving his client the means of readily ascertaining to what court he is to make his application for a taxation of the bill. Can it be said that any such information is given by a general statement that the business is "In Chancery?" The nature of the business described in the various items would not be understood by any lay person, and especially a female. With respect to the statute of limitations, it may be that the case is taken out of the statute where the bill consists of business done in the progress of one continuous suit. But there was no evidence to show that that was so here. [MAULE, J. It was taken for granted throughout the cause. Nobody disputed it.]

TINDAL, C. J. The objection as to the statute of limitations being disposed of, the only remaining question is that which arises upon the statute 2 G. 2, c. 23, s. 23, which, it is said, requires that an attorney's bill should, upon the face of it, show the name of the cause and the title of the court in which the business was done. I agree entirely with the decision of the court of Queen's Bench in *Lewis v. Primrose*, that, although the statute does not in express terms require the court and cause to be mentioned, yet it follows from the general scope and object of the clause that such information is necessary, in order to enable the client to [*717 "ascertain to what court or judge he is to apply for the taxation of the bill. We must assume, from the language of the judges in deciding that case, that they could not by fair intendment from the bill discern either the name of the court or the parties to the suit. Here, however, the name of the suit is given—*Falkner v. Matthews*: and I think it does appear, by fair and reasonable intendment, that the suit is in the court of Chancery. The first item, under date the 22d of December, 1835, is, "Attending on you, conferring and advising as to your *suits in Chancery*." Two days after occurs the following, "Perusing decrees and reports at Report office." Again, on the 6th of March, "Attending at the Six-Clerks' office," an office that is peculiar to the court of Chancery. Then, Hilary term, 1836, begins with the title of the cause, *Falkner v. Matthews*, which seems to be continued throughout; and many of the subsequent items of charge plainly and unequivocally point to proceedings that could take place only in a suit in Chancery, such as "Paid for minutes of decree," "Attending registrar, to settle minutes," "Copy minutes as wished to be settled, for the Lord Chancellor," "Attending court, cause in the paper." Then follow charges for passing and entering a decree, "instructions for interrogatories," and many others of the like tendency. The bill contains no charge having reference to any proceeding in a court of common law. Upon the whole, the only inference I can draw from the bill itself is, that it was a bill for charges incurred in a suit carried on under the name of *Falkner v. Matthews*, and in the court of Chancery.

MAULE, J. This is an action upon an attorney's bill; and the ques-

tion arises upon a plea denying the delivery of a proper signed bill under the statute 2 G. 2, c. 23, s. 23. At the trial I was of opinion that there
 *718] had been a sufficient compliance with the statute in this respect, and, accordingly, directed a verdict for the plaintiff for the amount of the bill; reserving leave to the defendants to move to enter a verdict for them on that issue, if the court should be of opinion that I had come to a wrong conclusion. The Lord Chief Justice has expressed an opinion that the view I took at the trial was correct; and I have reason to believe that my brothers CRESSWELL and EBLE, Js., agree with him in that opinion. I have the misfortune, however, to differ from them. I think I was wrong, and that I ought to have directed the jury to find for the defendants; and I form this opinion upon the best interpretation I am able to put upon the statute, as construed and explained by the authorities. The point certainly is not one that tends very much to the justice of the case. But I think it much more important that a statute should receive its proper construction, than that justice should be doled out to suit the circumstances of each particular case. The statute requires the attorney to deliver to his client a bill of his fees, charges, and disbursements, written in a common legible hand, and in the English tongue, except law terms and names of writs, and in words at length, except times and sums—a provision evidently calculated and intended to secure due information being given to simple people, to enable them at once to see, by a plain and intelligible statement, with what they are charged; and one that would have been unnecessary if the bill had been a document addressed to persons skilled in law and the practice of the courts. The object of this provision appears, from the subsequent part of the clause, to be, to enable the client to apply to the court, or to a judge of the court, in which the business, or the greatest part thereof, has been transacted, to have the bill taxed. The intent of the statute clearly was, to enable the client conveniently to get the bill *taxed, and, for that purpose, to inform him
 *719] where he is to apply to obtain such taxation; and that object would not be conveniently effected, unless the bill showed distinctly where the business had been done. The case of *Lewis v. Primrose* is, I think, substantially, in point. In that case certainly the name of the cause was not mentioned. But the omission of the name of the cause is a very slight inconvenience compared with the omission of the court. We cannot, without distinctly overruling that decision, say that it is not essential that the name of the court should appear with reasonable distinctness. Upon that point there is no difference of opinion amongst us. But the question is, what degree of certainty of information does the statute require? And, connected with that inquiry, is another, what degree of knowledge is the client bound to have? The Lord Chief Justice and my learned brothers think it does sufficiently appear upon the face of this bill that the whole, or the greater part of the business contained in it, was done in the court of Chancery, and therefore that that court only has

jurisdiction to refer it to taxation. This opinion is founded upon various items in the bill, which, it is said, can alone have reference to proceedings in a suit in Chancery. That presupposes the client to possess a considerable knowledge of the law. There is no presumption in this country that every person knows the law: it would be contrary to common sense and reason if it were so. In *Jones v. Randall*, Cowp. 37, Dunning, *arguendo*, says: "The laws of this country are clear, evident, and certain: all the judges know the laws, and, knowing them, administer justice with uprightness and integrity." But Lord MANSFIELD, in delivering the judgment of the court, says: "As to the certainty of the law mentioned by Mr. Dunning, it would be very hard upon *the pro- [720] fession if the law was so certain that everybody knew it: the misfortune is, that it is so *uncertain* that it costs much money to know what it is, even in the last resort." It was a necessary ground of the decision in that case, that a party *may* be ignorant of the law. The rule is, that ignorance of the law shall not excuse a man, or relieve him from the consequences of a crime, or from liability upon a contract. There are many cases where the giving up a doubtful point of law has been held to be a good consideration for a promise to pay money.^(a) Numerous other instances might be cited to show that there may be such thing as a doubtful point of law. If there were not, there would be no need of courts of appeal, the existence of which shows that judges may be ignorant of law. That being so, it would be too much to hold that ordinary people are bound to know in what particular court such and such a practice does or does not prevail. The question is, whether this bill conveys information enough to a person as ignorant of the law as he may with propriety be. I think the client is not to be presumed to know that the business has been done in Chancery, because of the mention of warrants, interrogatories, decrees, and the like. The first item of the bill speaks of a conference and advice as to suits in Chancery. There is, however, no heading, or any thing else, to show that this refers to any business in court. Afterwards there comes a charge for "perusing decrees and reports at the Report office," which, it is said, the client must know could only be in Chancery. I do not agree that the client is to be presumed to know any thing of the kind. At the time to which these items relate—December, 1835—the court of Exchequer was a court in which decrees and reports were familiar. Then, on the 16th of March, 1836, is a charge for "attending at the *Six-Clerks' office, searching for a record." This, [721] it is said, *must* be in a court of Chancery. I really am unable at the present moment to say whether there is or is not such an office now existing as the Six-Clerks' office; and I do not see why Miss Mary Falkner is bound to know it. That decrees may be, and are, pronounced in other courts besides the court of Chancery, we all know. In Doctors' Commons, for instance. Innumerable items in this bill might be referred

(a) Vide *Wade v. Simeon*, ante, 539. And see *Ib.* 560 (a).

to whence it would be impossible even for a person moderately skilled in law, to discover, with any reasonable certainty, that it was a bill for business done in the court of Chancery. To my mind, it does not appear with sufficient certainty that this business was done in a court having jurisdiction to refer it for taxation: and, unless that does sufficiently appear, the bill has not been properly delivered. On the 8th of February, 1836, I perceive a charge for "attending registrar to settle minutes." That, however, by no means conclusively shows that the business was in the court of Chancery. It is true there is a registrar in that court; but there is also a registrar in Doctors' Commons, and in the court of Admiralty.^(a) The item under the same date, "copy minutes, as wished to be settled, for the Lord Chancellor," might have reference to an intended application for an injunction. "Instructions for interrogatories," might relate to proceedings in this, or any other common law court. The items in which the Master of the Rolls is introduced, do not conclusively show that there were any proceedings in the Rolls court; ^(b) still less, that the greater *722] part of the proceedings took place there. I think I have done enough to show the grounds upon which my opinion of the insufficiency of this bill rests. I cannot, however, regret the conclusion at which the rest of the court have arrived, seeing that justice will be more promptly attained than if I had decided according to my present view at the trial.

CRESSWELL, J. I am of opinion that the direction of my brother MAULE was correct, and that the fourth plea afforded no answer to the action. I quite agree with the remark of Lord TENTERDEN in *Frowd v. Stillard*, 4 C. & P. 51, that "the object of the legislature is, that a client shall have his bill delivered to him in such language as he can understand." And I am not disposed to interfere with the decision of the court of Queen's Bench in *Lewis v. Primrose*. Lord DENMAN says: "The object of giving the information is, to enable the client to take steps to ascertain if the bill is a fair one." It appears to me that there is enough on the face of this bill, to inform the client of the court and the name of the cause in which the business, or the greatest part of it, was done. The earlier items, it is true, are not for business done in any cause. But, in Hilary term, 1836, the name of a cause is introduced; and, construing it according to ordinary intelligence and common sense, it would seem to me that all the subsequent proceedings must be taken to have been in the same suit. Several particulars have been pointed out by the Lord Chief Justice, which tend to show to any person who is competent to read and to understand the natural meaning of words, that the business was done in Chancery. By taking isolated instances, no doubt, an ambiguity may be raised: but,

(a) The defendants may have never heard of any other registrar than the registrar of births, deaths, and marriages.

(b) Proceedings before the Master of the Rolls might relate to the amendment of a writ of dower, or of a writ of *quare impedit*, pending in this court.

looking at the whole together, it seems to me to be intelligible enough. In Trinity term, 1840, "there are charges for "attending court on exceptions," immediately following charges for "instructions for exceptions," and "copy exceptions, for Master of Rolls;" and in the following term is an item, "Attending Mr. Bull, explaining to him the situation the parties were placed in by the decision of the Master of the Rolls." Any person reading that must conclude that these were charges for business done in the Rolls court. Upon the whole, therefore, I think the information required by the statute is given with sufficient particularity, and therefore that the rule for entering a verdict for the defendants should be discharged.

ERLE, J. I also am of opinion that this rule should be discharged. The statute requires that a signed bill be delivered; and the courts, looking at the intention of the legislature, have superadded a requisition that it shall be shown, on the face of the bill, in what court the business is done, as well as the name of the cause. Here, the bill is not headed in any court; and there is no mention of the name of a cause until the third page. It seems to be agreed, that, if enough appears to convey to a person of ordinary understanding in what court the business has been done, and in what cause, the requisitions of the statute have been complied with. I agree with the Lord Chief Justice and my brother CRESSWELL, that this bill does in these respects convey a reasonably sufficient amount of information. There is the title of a cause; and the subsequent items disclose the history of the proceedings, through the Masters' office, and the Rolls court, down to the obtaining a judgment in the suit. I think the plaintiff has done all the law requires of him. Rule discharged.

*CLARK v. DUNSFORD. Jan. 31.

[*724]

The undertaking to give material evidence upon bringing back the venue to the county in which it was originally laid, is satisfied by proving any fact which materially conduces to the establishing of matter which may be in issue, arising in the county to which the cause is restored, or tending to enhance the damages—per Tindal, C. J., and Maule and Cresswell, J.; *dissentiente*, Erle, J., who held that the undertaking binds the plaintiff to prove some matter arising in the original county, which is indispensable to be proved in order to maintain the action, or which tends to enhance the damages.

So, although the course of the pleadings or of the evidence may render such fact immaterial.

Therefore, in action for crim. con., an act done in Middlesex in furtherance of a plan for hiring lodgings at Bath, for the purpose of facilitating the commission of adultery there, was held by Tindal, C. J., and Maule and Cresswell, J., to be sufficient compliance with an undertaking to give material evidence in Middlesex; *dissentiente*, Erle, J.

THIS was an action of trespass against the defendant, a surgeon at Bristol, for criminal conversation with the plaintiff's wife.

The venue, which had originally been laid in Middlesex, was changed, at the instance of the defendant, to Somersetshire, upon the usual affidavit

that the plaintiff's cause of action, if any, arose in that county, and not in Middlesex, or elsewhere out of the county of Somerset. The plaintiff afterwards caused it to be brought back to Middlesex, upon the ordinary undertaking to give material evidence in that county.

At the trial, before CRESSWELL, J., at the last sittings in Middlesex, the plaintiff, having given evidence tending to prove adulterous intercourse between the defendant and his (the plaintiff's) wife, at the defendant's own house, at Bristol, called witnesses to establish a like criminal intercourse between the parties at a house at Bath in Somersetshire, occupied by Mrs. Needes, under the following circumstances:—On the 16th of July, 1845, a gentleman, who was identified by the witnesses as the defendant in the cause, called at the house of Mrs. Needes, and expressed a wish to
*725] hire the first floor furnished, *saying that he wanted it for the purpose of meeting a lady to whom he was privately married, and that his name was Lyde. Mrs. Needes being from home, her sister, Miss Withers, promised to communicate with her on the subject, and write to him. On the 25th, Mrs. Needes received a letter signed "W. Lyde," which letter was proved *alunde* to be in the handwriting of the defendant, and which appeared to have been posted on the preceding day at Swindon, in Wiltshire, and in which the writer requested to be informed whether or not he was to have the apartments; desiring that the answer might be addressed to "W. Lyde, Esq., British and Foreign Institute Hotel, George Street, Hanover Square, London." An answer was accordingly written by a nephew of Mrs. Needes, and sent addressed as requested. On the 29th of July, the defendant called at Mrs. Needes's, where he saw Miss Withers, and told her he had received the letter. He then paid her a month's rent in advance; and, in the course of the same day, the plaintiff's wife (who was likewise identified by the witnesses) called at the house, and passed several hours with the defendant there. There was no evidence to show how the defendant obtained possession of the letter addressed to W. Lyde, at the hotel in George Street, Hanover Square.

A waiter at the hotel proved that the defendant, who was well known as Mr. Dunsford, came there on the 16th of July; that his father died there on the 19th, his body remaining there till the 21st; that the defendant was at the hotel again on the 27th, and left it on the 28th. It was also proved by the waiter that the defendant was at the hotel from the 22d of August until the 26th.

Mrs. Needes further proved, that, on the 27th of August, she received another letter signed "W. Lyde," (in the handwriting of the defendant,) *726] dated London, *August 26th, informing her that the writer would be at Bath on the following day; and that the defendant accordingly came to her house on that day, and was again visited there by Mrs. Clark.

At the close of the plaintiff's case, Sir T. Wilde, Serjt., on the part of the defendant, applied for a nonsuit, on the ground that the defendant

had failed to comply with his undertaking to give material evidence of some matter in issue (a) arising in the county of Middlesex. Sir F. Thesiger, attorney-general, *contra*, insisted that the defendant was not entitled to avail himself of the objection unless he put in evidence the plaintiff's undertaking. This Sir T. Wilde declined doing.

The learned judge refused to nonsuit the plaintiff, but reserved leave to the defendant to move to enter a nonsuit, if the court should be of opinion that he was in a situation to ask it, and that the undertaking had not been complied with.

A verdict was found for the plaintiff, damages 5000*l*.

Sir T. Wilde, on a former day in this term, obtained a rule nisi for a nonsuit or a new trial. (b)

Talfourd, Serjt., (with whom was *Butt*,) showed cause. The undertaking to give material evidence in Middlesex not having been produced at the trial, the defendant is in precisely the same condition as if he had omitted to take the objection then, in which case he would not be in a situation now to ask for a nonsuit: *How v. Pickard*, 2 M. & W. 373, 5 Dowl. P. C. 606. *Santler v. Heard*, 2 W. Bla. 1031, is the first case on *record, of a motion to enter a nonsuit on the ground of an omission to comply with the undertaking. It does not, however, [*727 appear from the report of that case whether such an undertaking was put in or not. In the subsequent case of *Watkins v. Towers*, 2 T. R. 275, Grose, J., intimates a doubt whether the court had power to order a nonsuit to be entered against the consent of the plaintiff. At all events, the plaintiff in the present case did give evidence enough arising in Middlesex to satisfy the terms of his undertaking. There are many cases to show that very slight evidence will suffice. Thus, in *Gosling v. Birnie*, M. & M. 531, proof of a conversation with the defendant in the cause, referring to the matters involved in it, taking place after the writ had been sued out, was held sufficient to satisfy an undertaking to give material evidence in the county in which the conversation took place. In *Greenway v. Titchmarsh*, 7 M. & W. 221, 9 Dowl. P. C. 279, it was held that such an undertaking is satisfied by evidence bearing on the amount of damages: and, therefore, in an action for a breach of warranty of a horse, in which the issue raised on the pleadings was, whether the plaintiff bought the horse of the defendant or not, payment in Middlesex of the keep of the horse, after notice to the defendant of its unsoundness, was held sufficient to satisfy the undertaking to give material evidence in that county. So, in *Collins v. Jenkins*, 4 N. C. 225, 5 Scott, 589, in an action on a warranty of a horse, the venue having been changed from Middlesex to Worcestershire, and brought back upon the usual undertaking, a letter written by the

(a) When the undertaking is given it is uncertain what will be the matter in issue. And see post, 730.

(b) The rule was drawn up on reading the nisi prius record, and the two rules to change and bring back the venue.

plaintiff's attorney in Middlesex, apprizing the defendant of the breach of warranty, and stating that the horse was standing at livery at the defendant's expense, coupled with an admission in Middlesex, by the defendant's agent, of the receipt of that letter, was held a sufficient compliance with an undertaking to give material evidence of some matter in issue arising in Middlesex. In *Lawson v. Mangles*, 2 M. & Rob. 427, where the plaintiffs, who sued as assignees, sought to comply with the undertaking to give material evidence in London, by putting in the fiat and appointment of assignees, which had been enrolled in the court of bankruptcy in the city of London, PARKE, B., said: "I think the undertaking is satisfied by the proceedings in bankruptcy which are put in. The undertaking, having been given before plea pleaded, had reference to the declaration; and any evidence that would have been material to support the cause or right of action alleged in the declaration, if such cause or right had been traversed by the defendants' pleas, is sufficient to satisfy the plaintiffs' undertaking, though the defendants have not by their pleas put such right of action in issue. If the defendants had denied the bankruptcy by pleading, the proceedings in bankruptcy would have been necessary evidence." In *Watkins v. Towers*, 2 T. R. 275, proof of a rule for payment of money into court, was held sufficient, as being an admission of the contract. In *Lindley v. Bates*, 2 C. & J. 659, 2 Tyrwh. 746, the undertaking was held to be satisfied by proof of putting into the post, in the county to which the venue was restored, letters containing invoices touching the goods in dispute. [ERLE, J. The letters containing the invoices were direct evidence of the matter in issue.] VAUGHAN, B., there says: "In all the cases, it may be admitted to be laid down that there must be some evidence that is material; but, if it be so, we cannot discuss the *quantum* of materiality. If any one fact material to the issue be proved to have arisen in the county, that is sufficient." *In *Gilling v. Dugan*, ante, vol. i. p. 8, the defendant bought goods of A. at Southampton, within the county of the town of Southampton, which were sent to him at Southsea, in Hampshire: two months afterwards the plaintiff—for whom, it appeared, A., as agent, had made the contract—sent the defendant a duplicate invoice, enclosed in a letter posted in Middlesex: in reply, the defendant disclaimed all knowledge of the plaintiff, but admitted the contract with A., and expressed his willingness to pay the plaintiff, provided A. authorized him so to do: and it was held that these letters—A.'s agency being proved—were sufficient to satisfy an undertaking to give material evidence in Middlesex. The facts upon which the plaintiff relies are much stronger than those of any of the cases cited. The negotiation for the hire of the apartments at Bath—which were to be the scene of the adultery—was opened by the defendant on the 16th of July. His father was then lying on his death-bed at the hotel in George Street, Hanover Square. He died on the 19th; and on the 24th, before the funeral had taken place, the defendant addressed a letter from Swindon, in Wilt

shire, to Mrs. Needes, at Bath, desiring to know whether he was to have the apartments, and requesting that an answer might be forwarded to him, addressed to W. Lyde, at the hotel: on the 26th the answer came; and on the 29th, only ten days after his father's decease, the defendant is found in the possession of the lodgings at Bath, receiving the visits of Mrs. Clark. All this was most material evidence in estimating the degree of the defendant's guilt, and a legitimate subject for consideration upon the question of damages. Suppose an action had been brought by either party for a breach of the contract for the hire of the apartments, would not the letter received by the defendant and the letter *written by him in Middlesex, have been material evidence? It was most important in this case to show the preconcerted scheme for meeting the plaintiff's wife at Bath. Besides, it was impossible to foresee what questions of identity would arise at the trial. Again, on the 25th of August, the defendant wrote from the hotel in George Street to the landlady of the house at Bath, desiring that the rooms might be prepared for his reception on the 27th; on which day he was joined there by Mrs. Clark. The case is infinitely stronger than that of *The King v. Burdett*, 3 B. & Ald. 717, 4 B. & Ald. 95. There, the question was whether the letter, which was the subject of the information, had been published in Leicestershire. The letter, which was in the handwriting of the defendant, but without date or post-mark, was delivered open by Mr. Bickersteth, now Lord Langdale, the friend and legal adviser of the defendant, to a Mr. Brookes, on the 23d or 24th of August, 1819, for publication in the London newspapers. The only evidence to show a publication in Leicestershire was, that the letter was dated from the defendant's residence, Kirby Park, in that county, and that defendant was seen in that neighbourhood on the 22d and 23d of August; and it did not appear that he had left that place until after the publication of the letter in the newspapers. This was ruled by BEST, J., to be sufficient evidence to go to the jury; and the court afterwards held that the information was well laid in the county of Leicester. Here, the letters, coupled with the surrounding circumstances of misrepresentation and falsehood, were material to establish, not the entire cause of action, it is true, nor, perhaps, any part of the cause of action, but the preconcerted arrangement by the defendant for the perpetration of the guilty act of which the plaintiff complains; and they amply satisfied *the undertaking he entered into. The suggestion made on moving for this rule—that it was not competent to the plaintiff, after he had established a complete case of adultery at Bath, to proceed to give evidence of another distinct cause of action partly arising in Middlesex—is totally without foundation. As against the defendant, the plaintiff is entitled to avail himself of the affidavit upon which the rule to change the venue was obtained, wherein the defendant distinctly swears that the cause of action, if any, arose in the county of Somerset, and not elsewhere.

Sir T. Wilde, and Channell, Serjts., in support of the rule. The objec-

tion that the plaintiff has failed to satisfy his undertaking to give material evidence in Middlesex, clearly is one that can only be taken by way of nonsuit: *Santler v. Heard*, 2 W. Bla. 1031; *Bruckshaw v. Hopkins*, Cowp. 409; *Neal v. Neville*, 2 Marsh. 278; *Powell v. Rich*, Ibid. 494. And the defendant was not bound to produce the rule. It was enough to call the attention of the court and the counsel to the undertaking. It was at the plaintiff's option to perform or not the engagement he had entered into with the court: and, if he has failed to perform it, he cannot resist the authority of the court to direct a nonsuit to be entered. In ejectment, it is not necessary to produce the consent-rule as part of the plaintiff's case; but, if the defendant does not appear, or refuses to confess lease, entry, and ouster, and the plaintiff is thereupon nonsuited, the latter is entitled to judgment and execution (a) immediately: *Doe d. Greaves v. Raby*, 2 B. & Ad. 948; *Doe d. Flemming v. Armfield*, 1 Dowl. N. S. 327.

*732] Assuming, then, that the defendant has placed himself in a position to urge the objection, the undertaking has not been performed. In early times, the laying of the venue in the county where the cause of action arose, was rigidly enforced. Statutes were passed, and rules were made, imposing penalties for a departure from this course. It was competent to the defendant, originally, to move to *quash the writ*, if he could show it to have been sued out in a wrong county; (b) subsequently, he was allowed to *traverse* the county. Under the equity of the statutes, 6 Ric. 2 c. 2, and 4 H. 4, c. 18, the courts introduced the practice of changing the venue upon the defendant's affidavit; but, inasmuch as this was done upon a statement which the plaintiff had no opportunity of answering, he was allowed to restore the venue to the original county, upon an undertaking to give at the trial material evidence of some matter in issue arising in that county—giving the defendant the same (c) advantage that he would have had by a traverse on the record, for which the modern practice was substituted, viz., a nonsuit in case of the defendant's failure to comply with this undertaking: *Gilb. Hist. C. P. c. 7*; 1 Wms. Saund. 74, n. (2); *Santler v. Heard*. [TINDAL, C. J. Would not the undertaking be satisfied by proof of special damage arising in the original county?] Undoubtedly it would. [TINDAL, C. J. Then, as you cannot traverse the special damage, the terms are not convertible.] The damages are in issue in the cause. The plaintiff is bound, in order to satisfy the undertaking, to prove some part at least of the cause of action to have arisen in the county to which the undertaking applies. In *Lindley v. Bates* the evidence in Yorkshire *proved the

(a) Not in the action in which the default took place, but in the precedent action against the casual ejector, in which judgment and execution were *conditionally stayed*.

(b) *Vide post*, 742, n.

(c) Upon the *traverse* the plaintiff would be bound to show that the *cause of action* arose wholly or in part in the county in which he had stated it to have arisen. To this cause of action the matters ultimately in issue might be wholly collateral. *Et vide post*, 746, n.

contract. In *Curtis v. Drinkwater*, 2 B. & Ad. 169, which was an action against a coach-proprietor for negligence in conveying the plaintiff from Oxford to Leominster, the accident of which the plaintiff complained happened in Oxfordshire; and it was held that the inconvenience suffered, and expense incurred by the plaintiff in the county of Worcester, was material evidence of a matter in issue arising there, within the meaning of the undertaking given on restoring the venue. There, as in *Collins v. Jenkins*, 4 N. C. 225, 5 Scott, 589, the evidence went to show the plaintiff entitled to damages which he otherwise could not have obtained. There is nothing in any of the cases to show that the undertaking will be satisfied by proof of any collateral matter: and in *Cockerell v. Chamberlayne*, 1 Taunt. 518, the contrary was expressly held. What is the matter in issue here? The adultery in Somersetshire, and the amount of damages. When the plaintiff has proved a fact in Somersetshire from which he asks the jury to infer that adultery has been committed there, and, in order to strengthen that inference, goes on to prove a long series of independent and collateral facts occurring in Middlesex, can it be said that all these are material evidence of some matter in issue arising in Middlesex? Clearly not. [CRESSWELL, J., referred to the terms of the rule of Hilary term, 2 W. 4, c. 103, which provides that "the venue shall not be brought back, except upon an undertaking of the plaintiff to give material evidence (a) in the county in which the venue was originally laid."] That rule was framed for the mere purpose of assimilating the practice of the court of King's Bench and that of the Common Pleas, which were before at variance in this respect. The whole argument urged on [*734 *the part of the plaintiff shows the evidence in question to have tended remotely to substantiate a matter in issue arising in Somersetshire, and not elsewhere. In *Guard v. Hodge*, 10 East, 32, the venue was changed from Middlesex to Devonshire, in an action for criminal conversation, upon the usual affidavit that the whole cause of action, if any, arose in Devonshire, and not elsewhere out of that county; whereupon a rule nisi was obtained for discharging the rule to change the venue, upon an affidavit that the marriage of the plaintiff with his wife was had in Ireland. Lord ELLENBOROUGH said: "The rule for changing the venue having been made on the usual affidavit, that the whole cause of action arose in the county of Devon, and not elsewhere, makes it necessary to consider what is the whole cause of action in this case. Now, that is the trespass committed on the wife; and the proof of the marriage of the plaintiff, though necessary to entitle him to recover for the injury complained of, is no part of the cause of action. As in *Clarke v. Reed*, 1 N. R. 310, where upon a rule for changing the venue from London to Essex, in an action brought by the assignees of a bankrupt against the defendant for money had and received, it having been objected that the commission

(a) The rule is silent as to "some matter in issue." The introduction of this term into the undertaking appears to be calculated to lead to embarrassment and confusion.

had issued at Westminster, and that the assignees were chosen at Guildhall, and that, as it thereby appeared that the whole cause of action did not arise in Essex, the plaintiff was entitled to retain his action in London; the chief justice said, that, if the cause of action arose in two different counties, the defendant had no right to change the venue; but that the matters stated were no part of the *cause of action*, which must have arisen before the bankruptcy, though they were material evidence to be given in support of it; therefore that the plaintiff must undertake to give material evidence in London, in order *to draw back the venue.

*735] So, here, though the marriage be a material inducement to the right of the plaintiff to maintain the action in respect to the trespass on his wife, yet it is *no part of the cause of action*; and consequently the venue can only be brought back by the plaintiff's undertaking to give material evidence in Middlesex." Here, the cause of action is the adultery. To prove that, the plaintiff offers evidence of certain transactions alleged to have taken place in Middlesex, which, coupled with other facts arising at Bath, in Somersetshire, lead to a probable inference that the adultery was committed at that place. The court will bear in mind the reason of the rule and of the undertaking. If any thing occurred in Middlesex, tending in any degree to prove that the imputed adulterous intercourse really did take place at Bath, then there would have been some foundation for the plaintiff's argument. But, to satisfy the undertaking, the proof must be material to some matter in issue arising in the county of Middlesex. The fact of the defendant having made a contract in Middlesex for the hiring of the apartments at Bath, was wholly immaterial and collateral to the matter in issue. What are the facts? The defendant was resident at an hotel in Middlesex, where he was well known by the name of Dunsford. A letter was sent there by Mrs. Needes, addressed (it may be assumed) to the defendant by the name of Lyde, and that letter he afterwards, at Bath, admitted he had received. How a letter so addressed got to his hands, there was no evidence to explain. But it may be assumed that it did reach the defendant. He answered it by return of post, desiring Mrs. Needes to get the apartments ready for his reception on the following day. Now, the single fact to be established being the adultery at Bath, how can it be said that there was evidence of any matter in issue arising in

*736] Middlesex, when all that is proved to *have occurred there was something tending in some degree to strengthen the inference of adultery at Bath? The suggestion of the death of the defendant's father at the hotel in George Street, is just as remote from any bearing upon the matter in issue. To hold the evidence adduced here to be sufficient to satisfy the plaintiff's undertaking to give at the trial evidence of some matter in issue (a) arising in the county of Middlesex, will be going very much further than any of the authorities warrant, and infinitely beyond the reason upon which the practice is founded.

(a) Vide *suprà*, 733 (a).

TINDAL, C. J. The question in this case is, whether or not the plaintiff has complied with the undertaking entered into by him on obtaining the rule to bring back the venue to the county in which he had originally laid it, namely, to give material evidence at the trial of some matter in issue arising in the last-mentioned county. It is to be observed that the plaintiff is not by this undertaking required to show, as was formerly the case, that the whole cause of action arose in the county to which the venue is restored, but only to give material evidence of some matter in issue arising there. Sir W. BLACKSTONE, in *Santler v. Heard*, points out the alteration and progress of the law in this respect. "Originally," he says, "it was required that the plaintiff should give no evidence at the trial, but what arose in the county where the venue was retained.(a) If he gave none such, he must have been nonsuited, of course. But, when it was laid down, more liberally, in *Swaine's case*, 1 Siderf. 405,(b) that the plaintiff might lay his venue in any county wherein part of the cause of action arose, he was then bound *only to give some evidence and not the whole— [**737* *dare aliquam evidentiā*—in the county where the venue was laid ;(c) which continues to be the rule at this day." We have, therefore, to determine what is the true meaning of this undertaking, as contrasted with the former practice. I am of opinion, that, if the defendant proves any fact, which materially conduces to prove the matter in issue, arising in the county to which the venue is restored, he satisfies the undertaking. What was the matter in issue here? Whether the defendant had been guilty of adultery with the plaintiff's wife in the county of Somerset. If the plaintiff proved any matter arising in Middlesex which had a material tendency to establish the affirmative of that issue, that was a complete compliance with the undertaking. In the course of the argument it has been said, that, in considering whether or not the undertaking has been satisfied, regard must be had to the materiality of the evidence, and that it is entirely a question of degree. To my mind, however, it appears to be enough that it is such evidence as, in the judgment of reasonable men, would naturally conduce to the finding of the issue for the plaintiff. It suffices that it is material at the time. If it becomes immaterial by reason of other evidence given in the cause, or from the course of the pleadings, it is not the less in my opinion, a compliance with the undertaking. If it was once material, the plaintiff's undertaking is satisfied. Was the evidence here given material in this view? The question in issue was, whether or not the parties had committed adultery in the county of Somerset. If the plaintiff showed a complete plan and contrivance by the defendant in the county of Middlesex, by which the wife was to be brought into the company of the defendant in Somersetshire for the

(a) *Ferrers v. Jaques*, 1 Keb. 859; *Anon.* 1 Siderf. 442.

(b) There the question was, not, whether the plaintiff was entitled to bring back, but whether, under the circumstances, the defendant was entitled to change, the venue.

(c) *Anon.* 2 Salk. 669; *Anon.* 12 Mod. 515.

*738] purpose of an adulterous *intercourse there, who can doubt that that was material evidence of some matter in issue arising in Middlesex? It is true, it was not direct and immediate evidence of the fact of adultery: but it was evidence whence the jury might very justly infer a plot for carrying into effect the guilty design afterwards consummated in the county of Somerset. It appears that the defendant, under the assumed name of Lyde, addressed a letter from Swindon, in Wiltshire, on the 26th of July, to Mrs. Needes, at Bath, upon the subject of the hiring of the lodgings there, directing Mrs. Needes to send the answer addressed to him as "W. Lyde, Esq., British and Foreign Institute Hotel, George Street, Hanover Square, London:" that the defendant was at that hotel on the day the answer arrived; that somebody got the letter; and that the defendant acted upon it, and afterwards admitted that it had come to *his* hands, and in reply to it wrote to Mrs. Needes to say that he would take possession of the apartments on the following day, which he did. The whole plan of obtaining the lodgings at Bath, for the criminal purpose for which they were afterwards used, was thus matured and carried into effect in Middlesex. It seems to me that that alone most materially conduced to the finding of the issue for the plaintiff, and therefore that the undertaking was properly complied with.

MAULE, J. I am of the same opinion. It is unnecessary to consider some of the points that have been discussed. The action is brought for criminal conversation with the plaintiff's wife, to which the defendant has pleaded not guilty. The venue originally was laid in Middlesex. The defendant changed it to Somersetshire, upon the usual affidavit that the cause of action arose at Bath, in the county of Somerset, and not
*739] elsewhere. The plaintiff brought it back to Middlesex, *upon an undertaking to give at the trial material evidence of some matter in issue arising in that county: and the question turns upon the construction of that undertaking. The evidence given at the trial, so far as this point is concerned, consisted of a letter written by the defendant in Wiltshire, and the answer thereto addressed to the defendant, at his desire, by the assumed name of Lyde, at an hotel in the county of Middlesex, and of another letter written by the defendant from the same hotel, containing a contract for the hiring of apartments at Bath, for the express purpose of meeting the plaintiff's wife. This clearly was a most important ingredient in the plaintiff's case. It was evidence of a contract made by the defendant in Middlesex for the hiring of apartments in the county of Somerset, to enable him to carry on the adulterous intercourse. The question is whether it satisfied the undertaking. On the part of the defendant it was insisted that the plaintiff was bound to show that the *cause of the action*, or some material part of it, arose in Middlesex. On the other hand it was contended that it was not necessary to show that any part of the cause of action arose there, but that the plaintiff complied with his undertaking by proof of some matter arising in Middlesex tending to sus-

tain the action or to enhance the damages, although the whole cause of action might have arisen elsewhere. I am of opinion that this latter proposition is correct, and that the undertaking may be complied with, notwithstanding no part of the plaintiff's cause of action may have arisen in Middlesex. The argument on the part of the defendant was founded chiefly on the form of the affidavit used on the motion to change the venue, and on the ancient law which compelled parties to bring their suits in the county in which the cause of action arose. I think, however, that the ancient practice, founded on the 6 Ric. 2, c. 2, and 4 Hen. 4, c. 18, *is by no means to be assumed to be the basis of the modern practice, or that the latter was designed to attain the same object [740 as the former. On the contrary, the ancient policy of the law was, that the trial should take place where the cause of action arose : (a) whereas, in modern times, the courts deal with the venue in actions transitory as they think fit. The application to change the venue is founded rather upon a usual form of affidavit, than upon a compliance with an exact rule of court. The courts are in the habit of considering where the action will, upon the whole, be the most conveniently tried. Where an impartial trial cannot be had in the county in which the venue is laid, or the place is remote from the residence of the witnesses, or there is any other sufficient cause, the court is in the habit of interposing, not for the purpose of enabling the parties to try the cause in the county in which the cause of action arose, but at the place at which it can with most convenience be tried. Construing the terms of the undertaking according to their natural import, they will not be found to differ from what we are now deciding. On the other hand, we should be doing violence to the words of the undertaking, if we were to hold that the plaintiff does not satisfy it, unless he proves that some part of the cause of action arose in the county to which the venue is restored. The undertaking makes no mention at all of the cause of action. If it had been intended that the plaintiff should engage to prove a cause of action arising in the county in which the venue was originally laid, the proper words were at hand to express that intention. The true meaning of the undertaking is this :—It may be that the whole cause of action arose in the county of Somerset ; but I undertake at the trial to give material evidence of some *matter in issue [741 arising in Middlesex, where the venue was originally laid. It is generally enough if the plaintiff shows that he had a substantially good reason for laying the venue in the county to which it is restored. I think the undertaking was not meant to be inconsistent ; it is not an issue taken upon the affidavit of the defendant on the rule for changing the venue, that the cause of action arose in Somersetshire, and not elsewhere, but a sort of confession and avoidance of it. That seems to me to be the result of the cases which have been referred to in the course of the argument. In *Lawson v. Mangles*, 2 M. & Rob. 427, PARKE, B., lays it down,

(a) Vide post, 742, n., 746, n.

that the undertaking is satisfied "by any evidence in the original county, not of the cause of action, but tending to support the cause of action, alleged in the declaration." In that case the bankruptcy was no part of the cause of action; and yet it was held that the undertaking to give material evidence in London was satisfied by proof of the appointment of the plaintiffs as assignees there. If we were to interpret the undertaking according to the defendant's affidavit, or according to what is said to have been the equity of the statutes 6 Ric. 2, c. 2, and 4 H. 4, c. 18, (a) we should be departing from the words and spirit of the undertaking as it is interpreted and acted upon in modern times. Notwithstanding the whole cause of action may have arisen in Somersetshire, yet, if the plaintiff showed evidence of any fact arising in Middlesex, which would, at the time the undertaking was given, be material to the inquiry then raised, that would be a satisfactory compliance with the undertaking. I do not agree that nothing short of proof of adultery in Middlesex would satisfy *742] the undertaking. I cannot conceive any thing to fall *more correctly within the description of evidence of some matter in issue arising in the county of Middlesex, than that the defendant in that county made a contract for the hiring of apartments in Bath for the express purpose of committing adultery with the plaintiff's wife. That such was his intention, is clear from his statement to Miss Withers, when he first went to look at the apartments. If that evidence was not material, it could only be excluded from that category on the ground that it did not prove any part of the cause of action; which proof, in my opinion, is not necessary to satisfy the undertaking. Without adverting to the other points urged on the argument, I agree with the lord chief justice, that the rule must be discharged, on the ground that the evidence given in Middlesex was sufficient to satisfy the plaintiff's undertaking.

CRESSWELL, J. I also think the rule for entering a nonsuit in this case ought to be discharged. In order to arrive at the true construction of the undertaking in question, we must look, not to the statute of Richard 2, nor to the origin of the practice on changing the venue—which might lead into much curious research (b)—but to that which is now the settled practice of the courts. I think it cannot be denied that the evidence given at the trial as to what took place in the county of Middlesex, most materially conduced to the verdict: it was most material in two respects; in the first place, it tended to prove the object the defendant had in view in meeting the plaintiff's wife at Bath; and, in the next place, it tended to show that the defendant was the person who hired the apartments at Bath, and who there met the plaintiff's wife. According to the old

(a) Vide *Cheney v. Lawrence*, M. 4 H. 6, fo. 2, pl. 4; *Stile v. Prior of Hailes*, M. 8 H. 6, fo. 23, pl. 9.

(b) Before the statutes a plaintiff brought his action "where he might soonest bring the defendant to answer," per Schard, (*John de Shardelow*, Just. of C. P.,) H. 10 E. 3, fo. 7, pl. 19. And see P. 14 E. 3, Fitz. Abr. *Brief*, pl. 274.

*practice, if the defendant wished to remove the venue from the place where the plaintiff had laid it, to another county, he was obliged to swear that the whole cause of action arose in the county to which he sought to change it. The practice of the three courts upon the subject, before the rule of Hilary term, 2 W. 4., (a) differed. In the King's Bench, the rule to change the venue was absolute in the first instance; (b) in this court, it was a rule to show cause only, which was discharged, if, on showing cause, the plaintiff swore that the whole of the cause of action did not arise in the county to which it was sought by the rule to change the venue; and, in the Exchequer it was a rule nisi, which made itself absolute unless cause was shown to the contrary on or before the day therein mentioned. (c) In the King's Bench and (d) in the Exchequer, if the plaintiff wished to restore the venue to the original county, he could only do so upon undertaking to give material evidence in that county. In this court, however, the plaintiff did not undertake to prove a cause of action arising in the original county; it was enough if he showed that it did not *all* arise in the county to which the defendant sought to remove the venue; he was not bound to give any evidence at all in the other county. I point that out merely for the purpose of showing that the undertaking is not a mere equivalent for what before appeared on the affidavit. It is wholly different. It admits the truth of the affidavit—that the cause of action arose in the second county, and not elsewhere,—but it avoids the effect of that admission by engaging to give at the trial of the cause material evidence of some matter in issue arising in the original county. That is abundantly apparent from the cases of *Clark v. Reed*, 1 N. R. 310, and *Guard v. Hodge*. In the former, it having been objected, upon a rule for changing the venue from London to Essex, in an action brought by the assignees of a bankrupt against the defendant for money had and received, that the commission was issued at Westminster, and the assignees chosen at Guildhall, and that, as it thereby appeared that the whole cause of action did not arise in Essex, therefore the plaintiff was entitled to retain his action in London,—Sir JAMES MANSFIELD, C. J., said, that, if the cause of action arose in two different counties, the defendant had no right to change the venue; but that the matters stated were no part of the *cause of action*, which must have arisen before the bankruptcy, though they were material evidence to be given in support of it; and, therefore, that the plaintiff must undertake to give material evidence in London, in order to draw back the venue. So, in *Guard v. Hodge*, the venue having been changed from Middlesex to Devonshire, in an action for criminal conversation with the plaintiff's wife, upon the usual affidavit that the whole cause of action, if any, arose in Devon, and not elsewhere out of that county; and a rule nisi having been

(a) Vide 8 Bingh. 304, 3 B. & Ad. 399, *supra*, 733.

(b) 1 Chitt. R. 691 (a).

(d) After rule absolute.

(c) 1 C. & J. 378 (A).

obtained for discharging the former rule, and for bringing the venue back to Middlesex, upon an affidavit that the marriage of the plaintiff with his wife was had in Ireland,^(a)—Lord ELLENBOROUGH said: “ Though the marriage be a material *inducement* to the right of the plaintiff to maintain the action in respect to the trespass on his wife, yet it is no part of the cause of action; and, consequently, the venue can only be brought back by the plaintiff’s undertaking to give material evidence in Middlesex.” These cases clearly show that the undertaking was not considered, by any means, as equivalent to the affidavit, and that it does not bind the plaintiff to prove that any part of the **cause of action* arose in the county

*745] where the venue was originally laid. Here, the matter in issue was the adultery in Somersetshire. The whole case might have been proved by evidence arising in Middlesex. Suppose the plaintiff had called a witness who deposed to a conversation with the defendant in the county of Middlesex, in which the latter had given a detailed account of his intercourse with the plaintiff’s wife at Bath. If the jury believed the witness, the plaintiff must have had a verdict. Could it have been said that this was not a compliance with the undertaking? In *Gilling v. Dugan*, ante, vol. i. p. 8, the undertaking to give material evidence in Middlesex, was held to be satisfied by proof of an admission made by the defendant, in Middlesex, of a purchase of goods from an agent of the plaintiff at Southampton, in the county of the town of Southampton, to be delivered to the defendant at Southsea, in Hampshire. So, in *Lindley v. Bates*, 2 C. & J. 659, 2 Tyrwh. 746, it was held that an undertaking to give material evidence in the county to which the venue is restored, in an action for goods sold and delivered, is satisfied by proof of letters, containing invoices of goods, having been put into the post-office in that county at the time the goods were forwarded. The evidence there was not essential to the plaintiff’s case; the contract might have been proved *aliunde*. Upon the whole, I think the evidence given here was a sufficient compliance with the undertaking, the true construction of which has been given by the Lord Chief Justice and my brother MAULE, namely, that the plaintiff shall give evidence of some matter arising in Middlesex, that is material, and that conduces to prove the issue.^(b)

*746] *ERLE, J. I am of opinion that the undertaking to give material evidence of some matter in issue arising in Middlesex has not been complied with. The matter in issue in the cause was, the alleged adultery by the defendant with the plaintiff’s wife. The evidence given was, that a person calling himself Lyde, and who was identified as the de-

(a) It has been held that the undertaking is satisfied by proof of facts arising out of the realm, or in Scotland. *McClure v. McKeand*, 2 Taunt. 197, decided in this court subsequently to *Preston v. Stratton*, 2 Smith, 157, in the King’s Bench.

(b) *Quære*, whether proof of any matter either tending to support the action or enhance the damages, as the case stood at the time the undertaking was given or relevant to any issue eventually tried, would not have been a substantial compliance with the rule of court.

defendant, looked at some apartments in the house of a Mrs. Needes, at Bath, stating that he wanted them for the purpose of meeting a lady to whom he was privately married; that a letter was afterwards received from him, dated at Swindon, in Wiltshire, desiring to be informed if he could have the apartments, and directing that the answer might be addressed to him, in his assumed name, at an hotel in Middlesex; that a letter was accordingly sent to him there, which he answered, stating when he would take possession; that he appeared at the house at Bath on the day appointed; and that he there, on several occasions, received Mrs. Clark as his wife. That was abundant evidence to establish the plaintiff's case, and all arising in the county of Somerset. It is true that it depended on the credit due to the testimony of Mrs. Needes and her sister; and the evidence offered to show that the defendant was at the hotel in Middlesex about the time the letter was sent there addressed to Lyde, and which letter he acknowledged he had received, tended very much to confirm their accuracy. It was not, however, evidence of any matter in issue: it was simply confirmatory of the other direct testimony. I agree with the rest of the court that the plaintiff does not by this undertaking pledge himself to prove that the cause of action, or any part of the cause of action, arose in Middlesex. Formerly, in this court the rule to change the venue was discharged if the plaintiff showed that any part of the cause of action arose in a different county from that to which the defendant sought to change it. That, however, is not the effect of this undertaking. The plaintiff merely says, I will give material evidence of some matter in issue arising in Middlesex. There is a distinction between a matter in issue (a) and a cause of action. The marriage of the plaintiff, in a case of this sort, is in issue, but it is no part of the cause of action. (b) So, where assignees are suing for a debt due to the bankrupt, the bankruptcy is in issue, but it is no part of the cause of action. According to my view, the plaintiff binds himself by the undertaking, to prove some matter arising in Middlesex, that is indispensable to be proved in order to establish his cause of action as stated upon the record, with reference to its state at the time the undertaking is given. Evidence tending to enhance the damages, I conceive, would satisfy the undertaking. It seems to me that the evidence was not direct and material evidence to prove any matter in issue arising in Middlesex, but was only evidence having a tendency to confirm the direct evidence of matters in issue arising in Somersetshire, where was laid the scene of a transaction upon which the parties were at issue; and that the rule for entering a nonsuit ought to be made absolute. [747]

(a) The difficulty in this case appears to have arisen from, or to have been considerably complicated by the introduction of the words "some matter in issue," which are not required by the rule. Vide *suprà*, 733 (a).

(b) And *e contra* the *consortii amissio*, which was, strictly speaking, the cause of action, can hardly be said to have been a matter in issue.

As, however, the rest of the court are of a different opinion, the rule will be discharged. Rule discharged.(a)

(a) At common law the trial took place, not in the county in which the cause of action arose, or where the venue was originally laid, but in the county in which the fact upon which issue was joined was alleged in the pleadings to have occurred. Thus, if an action were brought in Essex, for words imputing perjury alleged to have been spoken there, and the defendant justified under an allegation of perjury committed in Middlesex, the *visne*, or neighbourhood by which the cause was to be tried, *came from a place in Middlesex, where a fact upon *748] which the parties were at variance was suggested to have occurred, and not from Essex, where nothing was alleged to have occurred, except that upon which the parties were agreed. *Ford v. Brook*, Cro. El. 261. Therefore, in *Bowyer's case*, Ib. 468, the judgment was reversed on the ground of mistrial, because the action (of slander) being brought in Shropshire, for words alleged to have been spoken there, and the defendant having justified the speaking of the words at the assizes at Chard in Somersetshire, and the plaintiff having replied *de injuriâ*, the cause had been tried in Shropshire. S. C. differently reported *per nos Bowyer v. Jenkins*, Sir F. Moore, 410. This reasonable practice was put an end to by the construction which the majority of the court of King's Bench in *Craft v. Boile*, 1 Saund. 241, put on the 16 & 17 Car. 2, c. 8, which enacts that no judgment shall be arrested or reversed, for that there is no right venue; so as the cause were tried by a jury of the proper county or place where the action is laid;—a statute which appears to have been framed *diverso intuitu*,—to prevent proceedings being defeated after verdict; *Adderley v. Wise*, 2 Lev. 164; and not to alter the course of trial. Vide 1 Wms. Saund. 241.

END OF HILARY TERM.(a)

(a) For the cases determined in this term on appeal from decisions of revising barristers, see *antè*, 60—197.

MEMORANDUM.

In the vacation after the last Michaelmas term, *Edwin Sandys Bain*, Esq., of the Middle Temple, and *Charles Wilkins*, Esq., of the Inner Temple, having received her majesty's writ, issued in vacation under the 6 G. 4, c. 95, and having in the same vacation taken the oaths usually administered to persons called to the degree and office of serjeant-at-law, became, under the provisions of that act, serjeants-at-law sworn.

The new serjeants gave rings; the former, with the motto "*A Deo et Regina*;" the latter, with the motto "*Non quo, sed quo modo*."

CASES
 ARGUED AND DETERMINED
 IN THE
COURT OF COMMON PLEAS,
 AND
 UPON WRITS OF ERROR FROM THAT COURT
 TO THE
 EXCHEQUER CHAMBER,
 IN
Hilary Vacation,

IN THE NINTH YEAR OF THE REIGN OF VICTORIA.

SALKELD v. JOHNSON and Others. Feb. 26.

Under 2 & 3 W. 4, c. 100, s. 1, a lay land-owner can establish an exemption in *non decimando* by proof of non-payment for one of the periods named in the statute, without showing the legal origin of the exemption; the exemption being claimed, not in respect of all tithes, (a) but in respect of particular articles, some being of modern introduction: per Coltman, and Erie, Ja. Per Tindal, C. J., and Cresswell, J., he cannot.

THE plaintiff was, in January, 1833, collated and instituted to, and inducted into, the vicarage of the parish and parish church of Crosby-upon-Eden, in the county of Cumberland, and in December, 1835, filed his bill of complaint in the Exchequer against the defendants, occupiers of lands within the parish, claiming, as vicar, to be entitled to all the tithes arising and renewing within the parish, except the tithes of corn and grain, and demanding an account and payment by the defendants *respectively, of the single value of the tithes of turnips, potatoes, cabbages, tares, grass, clover, rye-grass, sainfoyn, and other artificial grasses not made into hay, but used as and for green fodder, or carried off the land in a green state, and other green crops, had and taken by the defendants respectively upon and from off their respective lands in the said parish, since the plaintiff's collation and induction, and of the tithes of the agistment of barren and unprofitable cattle fed and

(a) As in *Fellows v. Clay*, 4 Q. B. 313, 3 Gale & D. 407.

agisted by the defendants respectively on their said respective lands during the same period; and which tithes were alleged by the bill to have been subtracted by the defendants respectively.

The defendants, by their answers, denied that the plaintiff, as vicar of the parish of Crosby-upon-Eden, was entitled to the tithes demanded by the said bill, and therein alleged that the lands in the parish, in their respective occupation, had been enjoyed, without payment or render of any tithes of the tithable matters and things the tithes whereof were demanded by the bill, or any of them, or money or other matter in lieu thereof, or any of them, to the vicar of the parish, for and during the whole time that two persons in succession had held the said vicarage, and for not less than three years after the institution of a third person thereto, and during such number of years as were sufficient to make up the full period of sixty years, and also the further period of three years after the institution of a third person to the said vicarage.

The defendants further alleged by their answers, that, in case the plaintiff ever had any right to the said tithes, such right had been barred in respect of all the said several tithable matters and things the tithes whereof were demanded by the plaintiff, by virtue of the act made and passed *751] in the 2 & 3 W. 4, c. 100, intituled "An Act for shortening the time required in claims of *modus decimandi*, or exemption from, or discharge of, tithes;" and that the same had been so barred in respect of all the lands in the occupation of the defendants respectively.

The defendants did not, by their answers, allege any ground of exemption from, or discharge of, tithes of the tithable matters and things, the tithes whereof were demanded by the plaintiff's bill, for the lands in their respective occupation, otherwise than by the enjoyment of such lands without payment of such tithes, or money or other matter in lieu thereof, for the above-mentioned period, and by the operation of the above-mentioned act.

The plaintiff did not, on his part, allege or set forth any proviso, exception, incapacity, disability, contract, agreement, deed, or writing, in the act mentioned, or any other matter of fact or of law not inconsistent with the simple fact of the exercise and enjoyment of the exemption claimed by the defendants of their respective lands from, or discharge of such land of, the tithes of the said tithable matters and things the tithes whereof were demanded by the plaintiff's bill, upon which he intended to rely.

The defendants, by their evidence in the cause, proved that the lands in their respective occupation had been enjoyed by themselves and the former occupiers thereof, without payment or render of tithes of the tithable matters and things the tithes whereof were demanded by the bill, or money or other matter in lieu thereof, to the vicar of the said parish, for and during the whole time that the Rev. William Gibson, who became vicar of the said parish in the year 1730, and the Rev. Henry Shaw, who

succeeded the said William Gibson in the vicarage in the year 1758, held the same vicarage, and for and during the period of three years after the *collation, institution, and induction of the Rev. Thomas Lowry, who succeeded the said Henry Shaw in the year 1791, to and into the said vicarage, and further for and during the whole of the remainder of the time that the said Thomas Lowry, who was vicar of the said vicarage when the said act of parliament was passed, held the said vicarage, and down to the time when the plaintiff, who succeeded the said Thomas Lowry in the said vicarage, filed his said bill of complaint against the defendants. [*752]

The plaintiff went into no evidence touching the exemption from, or discharge of, the defendants' respective lands from the payment of the tithes demanded by his bill.

The cause, having been transferred from the court of Exchequer to the court of Chancery, came on to be heard before Sir J. WIGRAM, V. C., on the 6th and 10th of November, 1841, and stood for judgment on the 8th of February, 1842, when his honour made his decree in favour of the plaintiff, for an account, and payment by the defendants, of the tithes demanded by the plaintiff's bill.

Against this decree the defendants presented their petition of appeal to the Lord Chancellor, which appeal came on to be heard before his lordship on the 17th and 18th of November, 1843; and on the 21st of the same month his lordship ordered this case to be stated for the opinion of the court of Common Pleas, relative to the construction of the above act of the 2 & 3 W. 4, c. 100.

The plaintiff and his predecessors, vicars of the said parish of Crosby-upon-Eden, have always received the tithes in kind, or moduses or compositions for the tithes of hay, with certain exceptions, and of milk, calves, wool, lambs, foals, bees, pigs, geese, and eggs and line. *Tithes of gardens, orchards, and hemp, have not been paid in the parish. [*753]

It is to be assumed that the plaintiff is entitled to the tithes of the tithable matters and things the tithes whereof are demanded by his bill, from the defendants' respective lands, unless, under the circumstances mentioned in this case, such lands are exempt from, or discharged of, such tithes.

The question for the opinion of the court is — whether, according to the true construction of the act of the 2 & 3 W. 4, c. 100, intituled “An act for shortening the time required in claims of *modus decimandi*, or exemption from, or discharge of, tithes,” a valid and indefeasible prescription, or claim, (for, or) of exemption from, or discharge of, tithes of turnips, potatoes, cabbages, tares, grass, clover, rye-grass, sainfoin, and other artificial grasses, not made into hay, but used as and for green fodder, or carried off the land in a green state, and other green crops, and of the agistment of barren and unprofitable cattle, or any of such tithes, can be sustained, under the circumstances hereinbefore mentioned, for the said

lands in the said parish of Crosby-upon-Eden, in the occupation of the defendants respectively.

The case was urged in Easter term last, (a) by *Channell*, Serjt., (with whom was Sir *T. Wilde*, Serjt.,) for the plaintiff, and by *Byles*, Serjt., (with whom was *Eagle*,) for the defendant.

The argument resolved itself into two principal points—the one, whether the statute 2 & 3 W. 4, c. 100, creates an exemption by reason of the non-payment or non-render of tithes during two incumbencies, equal to sixty years, and during three years of a third incumbency—secondly, whether, assuming that the statute does create such exemption *754] where it is claimed in *respect of *all* tithes, it applies to a case where the exemption is claimed in respect of part of the tithes only, and where some of the tithable matters are of modern introduction, and such in respect of which a *modus* could not be specifically pleaded.

The following authorities were relied on :—

For the plaintiff—*Crespigny v. Wittenoom*, 4 T. R. 790; *Hallewell v. Trappes*, 2 N. R. 173; *Butt v. Howard*, 4 B. & Ald. 655; *Layng v. Yarborough*, 3 Eagle & Y. 854, 1 Eagle on Tithes, 330, 331; *Mackintosh v. Hamilton*, not reported; the statutes 31 H. 8, c. 13, 13 Eliz. c. 10, 2 & 3 W. 4, c. 100, ss. 1, 7, and 3 & 4 W. 4, c. 27, s. 2; the opinions of *PATTESON* and *COLERIDGE*, Js., and of *ROLFE*, B., in *Fellowes v. Clay*, 4 Q. B. 313, 3 Gale & D. 407; and the decision of Sir J. *WIGRAM*, V. C., in *Salkeld v. Johnson*, 1 Hare, 196.

For the defendant—*Copeman v. Gallant*, 1 P. Wms. 320; *Doe d. Bywater v. Brandling*, 7 B. & C. 643, 1 M. & R. 600; *Benton v. Trot*, Sir Fra. Moore, 528, 1 Eagle & Y. 142; 6 Bac. Abr. Statute, (L. 2.) 394, 5th and 6th ed.; 1 Eagle on Tithes, 458, 2 Eagle on Tithes, 230; the statutes 2 & 3 W. 4, c. 71, and 2 & 3 W. 4, c. 100, ss. 1, 2, 4, 5, 6, 7; and the opinions of Lord *DENMAN*, C. J., and *WILLIAMS*, J., in *Fellows v. Clay*, ubi *suprà*.

Cur. adv. vult.

The judges, not agreeing in opinion, gave the reasons for the conclusions at which they had respectively arrived, as follows :—

TINDAL, C. J., (on behalf of himself and *CRESSWELL*, J.) Upon the general question proposed to us by the Lord Chancellor, my brother *755] *CRESSWELL* and myself are *prepared, though with considerable diffidence, when we perceive two of our brethren have arrived at an opposite conclusion, to certify our opinion to his lordship, “that according to the true construction of the statute 2 & 3 W. 4, c. 100, a valid and indefeasible prescription, or claim, of exemption from, or discharge of, tithes enumerated in the case sent to us, cannot be sustained under the circumstances therein stated.” And we now proceed, as concisely as possible, to state the grounds upon which that opinion rests.

The statute proposes to alter the law in two cases, which, at the time

(a) Before *Tindal*, C. J., and *Coltman*, *Cresswell*, and *Erie*, Js.

of passing the act, were distinguished from each other in a very important particular, namely, the case of a claim of a *modus decimandi*, and the case of a claim of a total exemption from, and discharge of, tithes; and the nature and object of that alteration are stated in the preamble of the act to be "the shortening the time required for the valid establishment of the claims in each respective case." Now, the distinction between the two cases, as the law stood at the time of passing the act, was, that the claim to exemption from the payment of tithes in kind upon the ground of a *modus decimandi*, could not be established by the simple proof of the constant and unvarying payment of the *modus* in lieu of tithe as far back as the time of legal memory extended; whilst the claim to an entire exemption from, or discharge of, tithe of land in lay hands, could not be established by the simple proof of the non-payment of tithes, or of any equivalent for the same, for the whole period which has elapsed since the time of legal memory; but proof must also have been given of the legal ground upon which such exemption rested, that is, that the lands had been parcel of the possessions of one of the greater religious houses dissolved by the statutes 31 Hen. 8, c. 13, and 32 Hen. 8, c. 24, and had been holden by such house from time immemorial, discharged from payment of tithes.

*In the case, indeed, of an exemption from tithes on the ground of a composition real, proof of non-payment or non-render of tithes [756] would be sufficient, if it went back to a time prior to the restraining statute 13 Eliz. c. 10. But still the deed of composition must be proved, or it must be inferred from evidence produced,—other than mere evidence of enjoyment without payment of tithes,—that such deed once existed.

In the one case, therefore, time of enjoyment, and time only, was the object of inquiry; in the other, not only time of enjoyment, but the legal ground of exemption also, the law not acknowledging the validity of an exemption from tithes upon the mere ground of non-payment,^(a) which was expressed in the common maxim, "*Modus de non decimando*,"^(b) in *laicis non valet*."

And the question upon the statute comes to this, whether the intention of the act,—to be collected from the words of it,—is, to place the two claims precisely on the same footing in respect of the evidence necessary for the support of each respectively, differing as they did at the time of passing the act, in the exigency of the proof required by law to establish their existence.

There can be no doubt but that it was perfectly competent for the legislature so to have enacted; and it may be fairly argued that such a provision would have been useful; and, further, it may perhaps be sur-

(a) See Watson's Clergyman's Law, p. 507.

(b) A man may prescribe in *non decimando*, or, not claiming an absolute exemption, he may qualify his liability by prescribing *de modo decimandi*; which latter prescription is, for the sake of brevity, usually called a *modus*. But here and post, 759, 761, the term "*modus*" appears to be used by the late lord chief justice in a wider sense, and to be treated by him as applicable to all prescriptions having any relation to tithes.

mised, from the fact of the statute having been brought into parliament on the recommendation contained in the report of the commissioners of the law of real property (cited by Lord DENMAN in his judgment, in *Fellowes v. Clay*,) *that such was the real intention of those who prepared the statute; for, the opinion of the commissioners upon that point is expressed in terms free from all ambiguity. But we are not at liberty to infer the intention of the legislature from any other evidence than the construction of the act itself; and, indeed, if we were allowed to draw any inference from the comparison between the language of the report and that of the legislature, the more legal inference would be, that the marked distinction, observable between the two, could not have been the result of accident, but must have been advised and intentional. At all events, if the legislature meant to effect what the commissioners advised, it seems to us that it is placed in the predicament, "*quod voluit, non dixit*."

It appears to us, that, upon the proper construction of this act, nothing more is effected than the shortening of the time required for the valid establishment of the claim in each respective case; but that, in the case of a claim for the total exemption from, or discharge of, tithes, the legal ground upon which such claim is founded must still be stated and proved, as before the passing of the act.

*758] The first section of the act, (a)—after the preamble, *which declares the general object of the legislature to be the prevention of

(a) The first section of the 2 & 3 W. 4, c. 100, recites, that "the expense and inconvenience of suits instituted for the recovery of tithes, may and ought to be prevented, by shortening the time required for the valid establishment of claims of a *modus decimandi*, or exemption from, or discharge of, tithes;" and enacts that "all prescriptions and claims of or for any *modus decimandi*, or of or to any exemption from, or discharge of, tithes, by composition real or otherwise, shall, in cases where the render of tithes in kind shall be hereafter demanded by the king, his heirs or successors, or by any duke of Cornwall, or by any lay person not being a corporation sole, or by any body corporate of many, whether temporal or spiritual, be sustained and be deemed good and valid in law, upon evidence showing, in cases of claim of a *modus decimandi*, the payment or render of such *modus*, and, in cases of claim to exemption or discharge, showing the enjoyment of the land without payment or render of tithes, money, or other matter in lieu thereof for the full period of thirty years next before the time of such demand, unless, in the case of claim of a *modus decimandi*, the actual payment or render of tithes in kind, or of money or other thing, differing in amount, quality, or quantity, from the *modus* claimed, or, in case of claim to exemption or discharge, the render or payment of tithes or of money or other matter in lieu thereof, shall be shown to have taken place at some time prior to such thirty years, or it shall be proved that such payment or render of *modus* was made, or enjoyment had, by some consent or agreement expressly made or given for that purpose by deed or writing; and, if such proof in support of the claim shall be extended to the full period of sixty years next before the time of such demand, in such cases the claim shall be deemed absolute and indefeasible, unless it shall be proved that such payment or render of *modus* was made, or enjoyment had, by some consent or agreement expressly made or given for that purpose by deed or writing; and, where the render of tithes in kind shall be demanded by any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other corporation sole, whether spiritual or temporal, then every such prescription or claim shall be valid and indefeasible upon evidence showing such payment or render of *modus* made, or enjoyment had, as is hereinbefore mentioned, applicable to the nature of the claim, for and during the whole time that two persons in succession shall have held the office or benefice in respect whereof such render of tithes in kind shall be claimed, and for not less than three years after the appointment and institution or induction of a third person thereto: Provided always, that if the whole time of the holding of such two persons shall be less than sixty years, then it shall be necessary to

expense and inconvenience of suits instituted for the recovery of tithes, "by shortening the time required for the valid establishment of claims of, a *modus decimandi*, or exemption from, or discharge *of tithes," [*759—proceeds to shorten the time which before was necessary to sustain each of such claims, by enacting that all prescriptions and claims of or for a *modus decimandi*, or of or to any exemption from or discharge of tithes, by composition real or otherwise, shall in future be sustained and be deemed good and valid in law, upon evidence of the length of enjoyment stated in the act. This enactment applies, in all its terms, equally to both cases; and the words used in the act have their full force and operation given to them in both cases, by shortening the time in each.

And it seems to us to be contrary to all analogy, that, after the words of the statute have been allowed a force and operation equally affecting and governing the two subject-matters to which they apply, they should be allowed a second force and operation applying to one of those subject matters only: and, after they have been held to shorten the time of prescription, both in the case of a *modus decimandi*, and of a claim of total exemption from tithes, they should be allowed the further or second operation of giving to the claim of a total exemption a quality and existence in point of law which it never had before; that is, that the words of the act should indirectly have the effect of making a *modus de non decimando*, (a) a good *modus*. For, there are no words in the first section which point to the dispensing with any proof which was before held necessary, except proof of the length of enjoyment; and no words which show that such proof of enjoyment as the act requires, shall *alone*, and of *itself*, be sufficient to support the latter claim. We think that the legal construction to be put upon the preamble and the words of the first section is, that the act shortens the time only, but leaves all other proof necessary, as it was before.

*It further appears to us, that, if the legislature had intended [*760 so important an alteration in the legal interests of tithe-owners and land-owners, with respect to the claim of total exemption from, or discharge of, tithes, as is now contended for, the intention to make such alteration would have been more clearly expressed; for, it is to be observed, that, amongst the very numerous claims for total exemption from tithes set up throughout the kingdom, very many of them (and the proportion of such to the whole number of claims is immaterial to the argu-

show such payment or render of *modus* made, or enjoyment had, (as the case may be,) not only during the whole of such time, but also during such further number of years, either before or after such time, or partly before and partly after, as shall, with such time, be sufficient to make up the full period of sixty years, and also for and during the further period of three years after the appointment and institution or induction of a third person to the same office or benefice, unless it shall be proved that such payment or render of *modus* was made, or enjoyment had, by some consent or agreement, expressly made or given for that purpose, by deed or writing." And see 4 & 5 W. 4, c. 83.

(a) Vide *supra*, 756, n.

ment) must, of necessity, be incapable of being supported, from the want of proof of any legal foundation. Such is the inference to be drawn from experience with respect to the numerous cases which have been brought into courts of justice. And it seems scarcely reconcilable with a just regard to existing rights, to place all claims for total exemption and discharge throughout the realm, without any distinction, whether well or ill founded, precisely on the same level, by making the enjoyment of such exemption for the statutory period, equally efficacious as to all. It was certainly to be expected, that, if the legislature had intended so important an alteration in the rights of parties, it would not have been left to a silent and doubtful inference, but would have been made the subject of express enactment.

Upon the construction, therefore, of the first section,—and the principal one which bears on the point in dispute,—we think the time of enjoyment necessary for the establishment of an entire exemption and discharge from tithes is shortened, but no other alteration made.

*761] The second section (a) confirms and makes valid every decree of a court of equity in a suit to which the ordinary, patron, and incumbent, were parties, and which has not been set aside or departed from; in which cases it must be observed, that no decree can have been obtained before the act, without proof, not only of the length of enjoyment, but of the legal ground of the exemption, whether founded on composition real, or the discharge of abbey lands.

The third (b) and fourth (c) sections do not appear to furnish any material observation with respect to the proper interpretation of the statute.

The fifth (d) and sixth (e) sections apply solely to the time during which the enjoyment has taken place.

(a) Sect. 2, enacts, “that every composition for tithes which hath been made or confirmed by the decree of any court of equity in England in a suit to which the ordinary, patron, and incumbent were parties, and which hath not since been set aside, abandoned, or departed from, shall be and the same is hereby confirmed and made valid in law; and that no modus, exemption, or discharge shall be deemed to be within the provisions of this act, unless such modus, exemption, or discharge shall be proved to have existed and been acted upon at the time of, or within one year next before the passing of this act.”

(b) Sect. 3, provides, “that this act shall not be prejudicial or available to or for any plaintiff or defendant in any suit or action relative to any of the matters before mentioned, now commenced, or which may be hereafter commenced, during the present session of parliament, or within one year from the end thereof.”

(c) Sect. 4, provides and enacts, “that this act shall not extend, or be applicable, to any case where the tithes of any lands, tenements, or hereditaments shall have been demised by deed for any term of life, or number of years, or where any composition for tithes shall have been made by deed or writing, by the person or body corporate entitled to such tithes, with the owner or occupier of the land, for any such term or number of years, and such demise or composition shall be subsisting at the time of the passing of this act, and where any action or suit shall be instituted for the recovery or enforcing the payment of tithes in kind within three years next after the expiration, surrender, or other determination of such demise or composition.”

(d) Sect. 5, provides and enacts, “that, where any lands or tenements shall have been,”

(e) See note (e) on the following page.

*The seventh section (a) appears to us to be quite consistent with that construction of the act at which we have arrived. It enacts, that, in all actions and suits to be commenced in future, it shall be sufficient to allege that the *modus*, or exemption, or discharge claimed, was actually exercised and enjoyed for such of the periods as are applicable to the particular case. There is nothing in this section, or in any part of the act, to give a new force to the word "*modus*," or to the words "exemption or discharge," or a force in any way different from that which they before possessed. [*762]

In pleading, therefore, the *modus decimandi* must be described in the same terms in which a *modus* was required to be described at the time of passing the act; and so also the exemption or discharge from tithes *must be described in pleading as it was described before. [*763]

The statute does not empower the party to plead, in the latter case, the mere non-payment of tithes during the period of time stated in the act; it only substitutes the pleading of the time required by the act, as the time "during which the exemption or discharge claimed" has been actually enjoyed, instead of pleading the exemption to have been enjoyed during time immemorial.

The statute further proceeds to state, that, if the opposite party intends to rely on any proviso, &c., contained in the statute, "or any other matter of fact or law not inconsistent with the simple fact of the exercise and enjoyment of the matter claimed, (*i. e.* either the *modus decimandi*, or the *modus de non decimando*,^(b) or the composition real,) the same shall be specially set forth in answer to the allegation of the party claiming."

shall be, held or occupied by any rector, vicar, or other person entitled to the tithes thereof, or by any lessee of any such rector, vicar, or other person, or by any person compounding for tithes with any such rector, vicar, or other person, or by any tenant of any such rector, vicar, or other person, or of any such lessee or compounder, whereby the right to the tithes of such lands or tenements may have been or may be during any time in the occupier thereof, or in the person entitled to the rent thereof, the whole of every such time and times shall be excluded in the computation of the several periods of time hereinbefore mentioned."

(e) Sect. 6, provides, "that the time during which any person, otherwise capable of resisting any claim to any of the matters before mentioned, shall have been or shall be an infant, idiot, *non compos mentis*, *feme covert*, or lay tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible."

(a) Sect. 7, enacts, "that, in all actions and suits to be commenced after this act shall take effect, it shall be sufficient to allege that the *modus*, or exemption, or discharge claimed was actually exercised and enjoyed for such of the periods mentioned in this act as may be applicable to the case; and, if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, deed, or writing herein mentioned, or any other matter of fact or of law not inconsistent with the simple fact of the exercise and enjoyment of the matter claimed, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of the matter claimed."

(b) Vide *supra*, 756, n.

The eighth section (a) has no bearing on the point in question, nor does it afford any inference as to the construction of the act either way.

Thus far the case rests upon reasons which are applicable generally to all claims of a *modus decimandi*, or an exemption from, or discharge of, tithes. But it is to be observed, that, in the present case, the claim is not of an exemption from the payment of tithes generally, but only from the payment of tithes of certain particular things; and it may be well doubted whether the statute has any application to such a state of *764] things; for, the evidence thereby required is "of the enjoyment of the *land without payment or render of tithes, money, or other matter in lieu thereof;" whereas, the land in question has not been enjoyed without payment or render of tithes, although the tithes in question have not been rendered, nor has any money or other matter been paid or rendered in lieu of them.

But, without referring to this particular ground, for the reasons above given, we think the certificate ought to be made in the terms above stated.

COLTMAN, J. I am of opinion, that, according to the true construction of the act of the 2 & 3 W. 4, c. 100, intituled, "An act for shortening the time required in claims of *modus decimandi*, or exemption from, or discharge of, tithes," a valid and indefeasible claim of exemption from, or discharge of, tithes of turnips, potatoes, cabbages, tares, grass, clover, rye-grass, sainfoin, and other artificial grasses, not made into hay, but used as and for green fodder, or carried off the lands in a green state, and other green crops, and of the agistment of barren and unprofitable cattle, can be sustained, under the circumstances mentioned, for the lands in the parish of Crosby-upon-Eden, in the occupation of the defendants.

It having been thought fit, in the present case, to give reasons at length, I proceed to subjoin those which weigh with me.

If the enacting clause of the statute (b) is read without the preamble, it appears to me that it is express, and not subject to any ambiguity. For the avoiding of confusion, it will be proper to consider the matter separately, as it relates to a claim of *modus decimandi* and to a claim of exemption: and, first, the case where tithe is demanded by the King, or *765] the Duke of Cornwall, *or by any lay person not being a corporation sole, or by any body corporate of many, whether temporal or spiritual. The enactment, as it relates to such a case, omitting all other matter, stands thus: "All prescriptions and claims of or for any *modus decimandi* shall be sustained, and be deemed good and valid in

(a) Sect. 8, enacts, "that, in the several cases mentioned in, and provided for by this act, no presumption shall be allowed or made in favour or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time, or number of years, than for such period or number mentioned in this act as may be applicable to the nature of the claim."

(b) Anté, p. 757, n.

law, upon evidence showing the payment or render of such *modus* for the full period of thirty years next before the time of such demand, unless the actual payment or render of tithes in kind, or of money or other thing, differing in amount, quality, or quantity, from the *modus* claimed, shall be shown to have taken place at some time prior to such thirty years, or it shall be proved that such payment or render of *modus* was made by some consent or agreement expressly made or given for that purpose by deed or writing; and, if such proof in support of the claim shall be extended to the full period of sixty years next before the time of such demand, in such cases the claim shall be deemed absolute and indefeasible, unless it shall be proved that such payment or render of *modus* was made by some consent or agreement expressly made or given for that purpose by deed or writing."

Now a claim to a *modus* or to any thing else which may be demanded, cannot be sustained by evidence of any thing less than that which shows a title to the thing demanded; therefore, when the act says that a claim of *modus* shall be sustained by evidence showing the payment or render of such *modus* for thirty or sixty years, it follows, by a necessary implication, that payment for thirty or sixty years makes a title, in all cases to which the act applies, defeasible only in the way pointed out in the act.

This view of the first section is quite in accordance with the seventh section,(a) by which it is provided, *that, in all actions and suits to be commenced after this act shall take effect, it shall be sufficient to allege that the *modus* claimed was actually exercised for such of the periods mentioned in this act as may be applicable to the case. Now, it surely cannot be sufficient to allege, in pleading, any thing less than that which amounts to a title; if this be so, the seventh section leads to the same conclusion as the first section,—that the payment of a *modus* for a limited time, constitutes a valid title. [*766

Is there any thing to be found in the preamble to the act which militates against the view of the subject which is here presented?

The preamble, as far as it relates to a claim of *modus*, is, "whereas the expense and inconvenience of suits instituted for the recovery of tithes, may, and ought to be, prevented, by shortening the time required for the valid establishment of claims of a *modus decimandi*." The construction I have been presenting does effectually shorten the time necessary for the valid establishment of a claim of *modus*, and does tend to prevent both the expense and inconvenience of suits instituted for the recovery of tithes; and the preamble and enacting clauses appear to be in perfect harmony with each other, as far, at least, as they relate to that claim: it seems to me, therefore, that there is no reason why the preamble should have the effect of restricting the natural import of the enacting clause relating to claims of *modus*.

But it has been objected, that, by the same mode of reasoning, every payment that has been made for the term of years limited by the act, may be contended to be valid, however objectionable in point of law it may be ; and it is assumed that such could not be the intention of the act of parliament, and that a construction leading to such a conclusion ought not to be admitted.

I do not know, that, in construing this act of parliament, we are warranted in assuming any other intention *than what is to be collected from the terms of the act, and from the terms of other acts *in pari materiâ*. If it is to be assumed, on any general supposed ground of expediency or probability, that the act cannot have meant to render every kind of *modus* which had been actually paid for the limited term, valid, it may well be doubted, whether the assumption is warranted by what is known of the intention of the framers of the act, and the reports of the commissioners, whose suggestions are supposed, on good grounds, to have led the way to this act. Such considerations must, therefore, be dismissed, and the act itself be looked to ; and it seems to me that it was clearly the intention of the act to remove some, at least, of the objections which, at the time when the act passed, were valid objections to the validity of a *modus*.

Thus, for instance, all objections founded on the score of rankness, or on the ground that the articles covered by the *modus* have been introduced within time of legal memory, seem to vanish, even on the theory of those who adopt the restricted construction of the statute, depending, as they do, merely on a question of time. It may, perhaps, not follow necessarily that every payment which has been made for the limited number of years, under the name of a *modus*, must be considered as valid, if it be deficient in those essential requisites which are necessary to constitute a *modus* ; for, it is a *modus decimandi* which the act professes to deal with ; and it may, with some reason, be contended, that the act applies only to such a payment as may reasonably be considered as a *modus* ; for a *modus decimandi* being a payment in lieu of tithes, unless the payment be made for the benefit of the person to whom *decimæ* are due, it may be fairly argued not to be a *modus decimandi*, and so not within the purview of the statute ; as, for instance, if a man sets up a *modus*, that he is bound, by the tenure *768] of his land, to repair the nave of the church, or that he *pays five shillings yearly to the parish clerk, or that the tenants of a manor pay such a rent to the lord, and, therefore, ought to be discharged of tithes, or that he maintains a chaplain in the church of B., without showing that it is within the parish, (all such instances, with others of the same sort, are collected in Com. Dig. *Dismes*, E. 15,) it may reasonably be urged that such claims are not claims of a *modus decimandi* within the meaning of the statute, or entitled to its protection.

That some questions of nicety and difficulty should arise in determining whether a particular payment should be considered as showing the ex-

istence of a *modus decimandi* within the meaning of the statute, is what might be expected. And, by the seventh section of the act, it is provided that, "if the other party shall rely on any proviso, exception, incapacity, disability, contract, agreement, deed, or writing, in the act mentioned, or any other matter of fact or of law, not inconsistent with the simple fact of the exercise and enjoyment of the matter claimed, the same shall be specially set forth in an answer to the allegation of the party claiming;" from which it appears that the act contemplates the possibility that matter of law may be set up in answer to a plea which sets up the actual payment of an alleged *modus* for the specified number of years.

The result of this examination, as it strikes me, is, that, in the case of what is properly to be called a *modus decimandi*, payment for the limited number of years is a title: whether every payment made in the name of a *modus* is to be considered as made in respect of a *modus decimandi*, within the purview and protection of the statute, may be a question in some cases; but it is one which it is not necessary to decide, in order to arrive at a solution of the present question.

To proceed to the cases described in the statute, as claims of exemption from, or discharge of, tithes by *composition real or otherwise. In reference to these exemptions, on which the present question more directly turns, the enacting clause (omitting so much as relates to *modus*) stands thus: "Be it enacted, that all prescriptions and claims of, or to, any exemption from, or discharge of, tithes, by composition real, or otherwise, shall, in cases where the render of tithes in kind shall hereafter be demanded by the King, or the Duke of Cornwall, or by any lay person not being a body corporate, or by any body corporate of many, whether temporal or spiritual, be sustained and be deemed good and valid in law, upon evidence showing the enjoyment of the land without payment or render of tithes, money, or other matter in lieu thereof, for the full period of thirty years next before the time of such demand, unless the render or payment of tithes, or of money, or of other matter in lieu thereof, shall be shown to have taken place at some time prior to such thirty years, or it shall be proved that such enjoyment was had by some consent or agreement expressly made or given for that purpose by deed or writing; and, if such proof in support of the claim shall be extended to the full period of sixty years next before the time of such demand, in such cases the claim shall be deemed absolute and indefeasible, unless it shall be proved that such enjoyment was had by some consent or agreement expressly made or given for that purpose by deed or writing."

I have already pointed out the grounds on which it appears to me, that, in cases of *modus*, the act has made the limited number of years, a title; and, on the same ground, which it is unnecessary to repeat, it appears to me that the act has made non-payment for the limited term, a title to an exemption.

It is objected, that the enacting clause of the statute is not intended to

embrace, and apply to, every case of non-payment, but only to certain cases, such as abbey lands, composition real, &c., and that none others are within the purview of the act; and the argument rests on the words of the preamble, "claims of exemption by composition real or otherwise," which must, it is said, be understood in a restricted sense, and must be confined in point of construction to such claims as have had a legal origin. Indeed, the restriction, to be available for any practicable purpose, must be carried further; for, as every exemption from tithe may have had a legal origin, the argument must be, that the application of the statute is to be confined to such cases as can be shown in evidence to have been founded on a composition real, or on some other legal ground of exemption, and, therefore, in order to make out an exemption by non-payment, it must be necessary to prove, in every case where a claim of exemption is to be made out under the act, not only the fact of non-payment, but also the ground of exemption, as, that there was a composition real, or that the lands are abbey lands, and so forth. But when I look to the first section to see what evidence is to be given in support of a claim of exemption, or to the seventh section to see what is to be alleged, I see no intimation whatever that any proof or allegation is requisite, that any deed of composition was ever made, or that the lands were ever abbey lands, but, on the contrary, an express statement that it shall be sufficient to allege the fact of non-payment.

It is clear, then, as it seems to me, that cases which are within the act are by the express words to be sustained by proof of non-payment only; and I am, therefore, unable to see with what consistency any cases can be considered as excluded from it, inasmuch as the same allegations could be made, and the same proof given, in their case, as the act declares to be sufficient in the case of claims of exemptions admitted to be within the act.

*771] "It may be urged that the effect of this mode of construing the statute will be, to give validity to claims which ought not in justice to prevail, creating a new head of exemption, and, in effect, enabling a layman to prescribe *in non decimando*.

It cannot, I think, be denied that the injustice suggested may follow in some instances, though, I apprehend, such instances would be rare.

The rule that a layman cannot prescribe *in non decimando* has been so long established, and so universally known, that few cases can be supposed to have existed at the passing of the statute, in which tithes had remained unpaid for a long series of years, unless there had been originally a real foundation for the exemption. An evil of an opposite kind did, I believe, frequently exist, and was, I apprehend, the real evil the statute was designed to meet, namely, the cases where a legal exemption had existed, but the proof of it was lost, or was attended with great expense and inconvenience. That the evidence of such a well-founded claim to exemption had been lost in process of time, and in subdivision of proper-

ties, was, I conceive, a matter of frequent occurrence; and if, in some cases, injustice is done on the one hand, a great amount of injustice is prevented in many others. The objection made to the construction of the act on this ground, is equally applicable to all the statutes of prescription. In all such cases an injustice may be said to be done to the party who has a good right, but which is barred by the statute. But the balance of justice and convenience is found to be the other way; and, on the whole, it is most for the general interests of society that possession and enjoyment for a length of time should be looked to as the safest evidence of men's rights; and such I conceive to have been the intention of the statute. The possibility, therefore, of some cases of injustice incidentally happening ought not to lead to any straining of the words of the statute [*772 from their natural import.

If a more limited construction of the act is adopted, and it is held to have no operation but that of bringing down the time of prescription from the 1 Richard I. to the time mentioned in the statute, or, in other words, that non-payment for the limited time is to be taken as conclusive proof that tithes have never been paid since the 1 Richard I., which, as far as I understand it, is the construction of those who adopt the restricted construction, its operation with respect to claims of exemption will be reduced within very narrow limits.

If we take the case of a composition real, in which it was necessary to prove, when the tithe-owner was a spiritual person, the existence of a deed of composition made before the 13 Eliz. c. 10, and a compensation made to the tithe-owner and his successors, and to show a connection between the supposed deed and the compensation given in lieu of tithes to the spiritual tithe-owner, is it still necessary to prove, in addition to non-payment for the limited time, the existence of a deed and of a compensation made to the tithe-owner, and to show the connection of the supposed deed and the compensation? If such proof is requisite, (and such is the contention of those who uphold the restricted construction,) I do not see how any claim to exemption by composition real can be brought within the benefit of the statute; for, the statute only declares claims to exemption by composition real to be valid, on evidence showing the enjoyment of the land without payment or render of tithes, money, or *other matter in lieu thereof*, for the limited time. The very circumstance, therefore, which would, on this construction of the statute, be necessary to be proved in order to establish a claim of exemption, namely, the compensation to the tithe-owner, would exclude the party proving it, from the benefit of the statute. *The consequence would be, that all that conflict of evidence would be let in, and all the expense [*773 and inconvenience incurred, which it was the object of the statute to prevent.

Again, I would consider the case of a claim of exemption of lands, as being abbey lands, as, for instance, lands belonging to the Cistercians, a

mised, from the fact of the statute having been brought into parliament on the recommendation contained in the report of the commissioners of the law of real property (cited by Lord DENMAN in his judgment in *Fellowes v. Clay*), *that such was the real intention of those who prepared the statute; for, the opinion of the commissioners upon that point is expressed in terms free from all ambiguity. But we are not at liberty to infer the intention of the legislature from any other evidence than the construction of the act itself; and, indeed, if we were allowed to draw any inference from the comparison between the language of the report and that of the legislature, the more legal inference would be, that the marked distinction, observable between the two, could not have been the result of accident, but must have been advised and intentional. At all events, if the legislature meant to effect what the commissioners advised, it seems to us that it is placed in the predicament, "*quod voluit, non dixit*."

It appears to us, that, upon the proper construction of this act, nothing more is effected than the shortening of the time required for the valid establishment of the claim in each respective case; but that, in the case of a claim for the total exemption from, or discharge of, tithes, the legal ground upon which such claim is founded must still be stated and proved, as before the passing of the act.

*758] The first section of the act, (a)—after the preamble, *which declares the general object of the legislature to be the prevention of

(a) The first section of the 2 & 3 W. 4, c. 100, recites, that "the expense and inconvenience of suits instituted for the recovery of tithes, may and ought to be prevented, by shortening the time required for the valid establishment of claims of a *modus decimandi*, or exemption from, or discharge of, tithes;" and enacts that "all prescriptions and claims of or for any *modus decimandi*, or of or to any exemption from, or discharge of, tithes, by composition real or otherwise, shall, in cases where the render of tithes in kind shall be hereafter demanded by the king, his heirs or successors, or by any duke of Cornwall, or by any lay person not being a corporation sole, or by any body corporate of many, whether temporal or spiritual, be sustained and be deemed good and valid in law, upon evidence showing, in cases of claim of a *modus decimandi*, the payment or render of such *modus*, and, in cases of claim to exemption or discharge, showing the enjoyment of the land without payment or render of tithes, money, or other matter in lieu thereof for the full period of thirty years next before the time of such demand, unless, in the case of claim of a *modus decimandi*, the actual payment or render of tithes in kind, or of money or other thing, differing in amount, quality, or quantity, from the *modus* claimed, or, in case of claim to exemption or discharge, the render or payment of tithes or of money or other matter in lieu thereof, shall be shown to have taken place at some time prior to such thirty years, or it shall be proved that such payment or render of *modus* was made, or enjoyment had, by some consent or agreement expressly made or given for that purpose by deed or writing; and, if such proof in support of the claim shall be extended to the full period of sixty years next before the time of such demand, in such cases the claim shall be deemed absolute and indefeasible, unless it shall be proved that such payment or render of *modus* was made, or enjoyment had, by some consent or agreement expressly made or given for that purpose by deed or writing; and, where the render of tithes in kind shall be demanded by any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other corporation sole, whether spiritual or temporal, then every such prescription or claim shall be valid and indefeasible upon evidence showing such payment or render of *modus* made, or enjoyment had, as is hereinbefore mentioned, applicable to the nature of the claim, for and during the whole time that two persons in succession shall have held the office or benefice in respect whereof such render of tithes in kind shall be claimed, and for not less than three years after the appointment and institution or induction of a third person thereto: Provided always, that if the whole time of the holding of such two persons shall be less than sixty years, then it shall be necessary to

expense and inconvenience of suits instituted for the recovery of tithes, "by shortening the time required for the valid establishment of claims of a *modus decimandi*, or exemption from, or discharge *of tithes," [*759 —proceeds to shorten the time which before was necessary to sustain each of such claims, by enacting that all prescriptions and claims of or for a *modus decimandi*, or of or to any exemption from or discharge of tithes, by composition real or otherwise, shall in future be sustained and be deemed good and valid in law, upon evidence of the length of enjoyment stated in the act. This enactment applies, in all its terms, equally to both cases; and the words used in the act have their full force and operation given to them in both cases, by shortening the time in each.

And it seems to us to be contrary to all analogy, that, after the words of the statute have been allowed a force and operation equally affecting and governing the two subject-matters to which they apply, they should be allowed a second force and operation applying to one of those subject matters only: and, after they have been held to shorten the time of prescription, both in the case of a *modus decimandi*, and of a claim of total exemption from tithes, they should be allowed the further or second operation of giving to the claim of a total exemption a quality and existence in point of law which it never had before; that is, that the words of the act should indirectly have the effect of making a *modus de non decimando*, (a) a good *modus*. For, there are no words in the first section which point to the dispensing with any proof which was before held necessary, except proof of the length of enjoyment; and no words which show that such proof of enjoyment as the act requires, shall *alone, and of itself*, be sufficient to support the latter claim. We think that the legal construction to be put upon the preamble and the words of the first section is, that the act shortens the time only, but leaves all other proof necessary, as it was before.

*It further appears to us, that, if the legislature had intended so important an alteration in the legal interests of tithe-owners [*760 and land-owners, with respect to the claim of total exemption from, or discharge of, tithes, as is now contended for, the intention to make such alteration would have been more clearly expressed; for, it is to be observed, that, amongst the very numerous claims for total exemption from tithes set up throughout the kingdom, very many of them (and the proportion of such to the whole number of claims is immaterial to the argu-

show such payment or render of *modus* made, or enjoyment had, (as the case may be,) not only during the whole of such time, but also during such further number of years, either before or after such time, or partly before and partly after, as shall, with such time, be sufficient to make up the full period of sixty years, and also for and during the further period of three years after the appointment and institution or induction of a third person to the same office or benefice, unless it shall be proved that such payment or render of *modus* was made, or enjoyment had, by some consent or agreement, expressly made or given for that purpose, by deed or writing." And see 4 & 5 W. 4, c. 83.

(a) Vide *supra*, 756, n.

A title is the fact to which the right is by law annexed—which is to be pleaded as the foundation of the right in case it is litigated. The right in question here, is, a right to an exemption or discharge; and the statute annexes that right to the fact of enjoyment for the required time. If the words of the enactment were alone regarded in a suit involving a claim of *modus*, exemption, or discharge, enjoyment thereof for the required time would be the fact alleged in pleading, and upon the finding of that fact the claim would be, by law, valid.

The same words in the same sentence have the effect of making enjoyment for the required time, a title to a *modus*; and, though time made a title to a *modus* before, it was a different title, as a period of about six hundred years was required, instead of a period of about sixty years.

The act of the 2 & 3 W. 4, c. 71, relating to easements derived from prescription, or supposed grants, after reciting that the title to matters long enjoyed, is liable to be defeated, enacts that the right shall be absolute and *indefeasible, on proof of enjoyment for the required *777] period. This statute is *in pari materiâ*; the words are to the same effect as those in the statute in question; and the construction has been, to make the statutable time a title to the right. It seems reasonable to give the same effect to the words applied in the same sentence to *modus*, exemption, and discharge, and also to give the same effect to the same words used in statutes *in pari materiâ*. This construction is in accordance with the whole preamble, both because the expense and inconvenience of suits will probably be prevented by making the fact on which the right is to depend more simple and capable of ascertainment from living witnesses, and also because time alone is to be required for the establishment of the rights in question, and the length of that time is shorter than was before required, where a title was to be derived from time alone.

It was contended, for the plaintiff, that proof of a legal origin for a claim of exemption or discharge is necessary, since the statute, as it was before; that the preamble shows that the legislature intended to confine the operation of the enactments to those claims only in which time was required for their establishment, and, in them, to the effect of shortening the time so required; and, as time was required in only one of the two classes into which such claims were divided, that the statute applied to that class only. This construction directly violates the rule against altering the effect of clear words of enactment by the preamble, (a) and in an extreme degree, as the enactment, taken by itself, has a certain meaning, while the preamble, which is supposed to control it, is uncertain and equivocal.

But, supposing this not to be a fatal objection, if we ascertain the sense *778] in which time could be said to be *required for the establishment of claims of *modus*, exemption, and discharge, and also the sense

(a) See Bacon's *Leges Legum*, *Aphorism*, 71; and see note thereon in Dupin, *Manuel des Etudiants*, 113.

in which claims of exemption or discharge could be said to be reduced into the two classes, namely, where there is legal origin, and where there is no legal origin, and then apply the statute according to the plaintiff's construction, it will be found that it has no operation in respect of claims of exemption and discharge.

As to the sense in which time could be said to be thus required upon a claim of *modus*, the time of the enjoyment was the title, and proof thereof was indispensable.

Upon a claim of exemption under the 31 H. 8, c. 13, the fact of the lands being held exempt, by the abbey at its dissolution, was the title. If that fact was proved, all reference to time of enjoyment was superfluous. An exemption derived from the statute would not have been destroyed by any subsequent render of tithes in kind; *Clanrickard v. Denton*, 1 Gwill. 363.(a)

Upon a claim of discharge by composition real, the deed of composition was the title. If that was proved to be executed by all the parties interested, and to be *in force, all reference to time of enjoyment was again superfluous; but, though time formed no part of the [779 indispensable proof upon either of the latter claims, and was not, in that sense, required for their establishment, still, in practice, evidence of enjoyment for a long time was constantly adduced, because direct proof of the composition deed, or of the holding exempt by the abbey, could not be given, and resort was had to presumptive evidence, and, among presumptions, to that from a long time of enjoyment. It was not alone sufficient, in support of either of these claims; and a rule of evidence, apparently anomalous, required some presumption specifically referring to the origin of the claim, to be also shown; but, when this rule had been complied with, if a weak presumption specifically applicable to the origin had been raised, then the length of the time of enjoyment was allowed to strengthen it, and so to establish the claim of an exemption or discharge.

As to the sense in which claims of exemption or discharge could be said to be considered by the legislature as reduced into the two classes, namely, where there was, and was not legal origin,—practically speaking, there was no class of claims in which the claimant admitted at the outset that there was no legal origin for his claim; while they had existence as claims, there was an endeavour to find evidence of a legal origin; and,

(a) Where this was said *obiter* by Doderidge, J. This dictum is not noticed by the other reporters, and the point did not properly arise in the case, even as reported in Gwillim. Lady Denton libelled for tithes, and Lord Clanrickard suggested for a prohibition, that the land was discharged in the hands of the prior of Tunbridge by an immemorial prescription *in non decimando*. This prescription was disproved, as it appeared that the prior was discharged, not by prescription, but by bull. After consultation awarded, Lady Denton added to her libel by alleging a modern perception of tithes in kind; and it was held that she could not make the addition. This decision would rather import that the added allegation was considered as not wholly immaterial. It appears from 3 Roll. Rep. 207, that the court would have granted a second prohibition if "Mr. Doctor Pope" had not "pulled off the addition which he had made to the former libel." And see S. C., Palmer, 37, where other circumstances relative to the claim are noticed and discussed.

when it was ascertained that there was none, the suit upon that claim was virtually at an end. If the claims which were the subjects of the expensive suits intended to be relieved against by the statute, were classed with reference to their legal origin, it should be said that there was one class in which some specific evidence of a legal origin, in addition to the general presumption from a long time of enjoyment, could be adduced, and one in which no such evidence could be adduced; that the existence or *780] non-existence of any such legal evidence was generally *ascertained only after much expense: and that, until such ascertainment, evidence of length of enjoyment was equally requisite for both classes.

Such a classification appears to me not to have been contemplated by the legislature. But assuming its existence, and that the application of the statute was intended to be confined to the class where there is some presumptive evidence specifically relating to a legal origin, and the time of enjoyment is required to strengthen the presumption therefrom, the statute has no operation. It does not alter the admissibility of evidence, either party being at liberty to resort to any evidence before admissible; nor does it alter the effect of the evidence when received; for,—let it be supposed, upon a claim of exemption, that the fact of a legal origin is to be tried according to the plaintiff's contention, and that evidence specifically applicable thereto, and also evidence of enjoyment for the statutable period, has been adduced in support of it, and that evidence rebutting the evidence specifically applicable to a legal origin, has been adduced in answer, and that the jury is convinced that there was no legal origin,—if they are not bound by the statute to answer in the affirmative, when their judgment dictates a negative, the statute has operated nothing. I presume that they are not so bound; but, if they are, then enjoyment for the statutable period will have established the title to the exemption, where the fact of legal origin is negatived; which is contrary to the substance of the plaintiff's construction, and is the proposition which the defendant maintains.

By the plaintiff's construction, the primary intention recited in the preamble,—of preventing the inconvenience and expense of suits for the establishment of claims of exemption and discharge,—would be sacrificed; and the secondary intention of shortening the time required, would not be effected.

*781] *Some reliance on the part of the plaintiff has been placed on the seventh section, requiring *the* exemption or discharge to be pleaded, which he construes to require the origin to be pleaded; but it appears to me *the nature of the exemption or discharge* is intended, and not the origin.

The words of the first section comprise all exemptions and discharges. But discharges by composition real may vary, as agreements might have varied before the 13 Eliz., and may be for all tithable articles, or *fo.*

some ; for articles at present known, or hereafter to be discovered ; for all times, or for certain times only. Exemptions under abbeyes may vary to the same extent ; as some abbeyes had made compositions real of various kinds, and had derived exemptions from them as well as from prescription and *ratione ordinis*, and from unity of possession ; and, as the exemption now must be exactly that which the abbey held on the day of dissolution, an exemption derived to the abbey from compositions real may be total or partial, both as to tithable articles and as to times : it is therefore requisite to particularize the exemption or discharge claimed, as much as to state the species of *modus*.

The plaintiff's argument on this point appears to assume that every exemption and discharge must be total and for all time.

The injustice arising from allowing time to defeat a valid title, is apparent ; and the principle of presuming a right from long enjoyment, to prevent this injustice, has been applied to the lands of the ecclesiastical owners by the 2 & 3 W. 4, c. 27, to easements over them, by 2 & 3 W. 4, c. 74, and to *moduses* for tithes, and to discharges by compositions, confirmed by decree in equity, by the statute now in question. It is not easy to understand why the principle is not to apply to other discharges and exemptions from tithes.

*The following certificates were, on the 26th of February, [*782 1846, sent to the lord chancellor.

"We are of opinion, that, according to the true construction of the statute 2 & 3 W. 4, c. 100, a valid and indefeasible prescription or claim of exemption from, or discharge of, the tithes enumerated in the case sent to us, *cannot* be sustained under the circumstances stated.

"N. C. TINDAL.

"C. CRESSWELL."

"We are of opinion, that, according to the true construction of the statute 2 & 3 W. 4, c. 100, a valid and indefeasible prescription or claim of exemption from, and discharge of the tithes mentioned in the question, can be sustained, under the circumstances, and for the lands mentioned in the case.

"T. COLTMAN.

"W. ERLE."(a)

(a) In *Bolls v. Atkinson*, 1 Lev. 185, 1 Siderf. 320, S. C. *per nom.* ; *Bowles v. Atkins*, 2 Keble, 28, 60, 162, 175, where an abbot, time out of mind, had held lands discharged of tithes, it was held that the alienee should pay tithes, on the ground that it should be taken as a personal prescription, and not as a composition real. Upon which Serjt. Hill observes, "This case did not arise upon the stat. 31 H. 8, c. 13, of dissolution, and therefore there was nothing to continue the discharge of tithes if it were only a personal discharge, as it might be for any thing that appears to the contrary ; for, then the discharge was lost by the alienation to the college, as the college is not an ecclesiastical corporation, though such has been the favour to colleges that they have been sometimes so considered, 2 Keble, 171 : but, if the abbots had continued seized till the statute 31 H. 8, and the king had become entitled under that statute, and the college under the king, the privilege of exemption would have continued ; but still there is a contrariety of opinions how the discharge ought to be pleaded. Buller, 190, 248."

In *Sir W. Jones*, 369,—where the allegation was that the prior of B. held lands discharged of tithes,—Croke said it should be intended to be on a real composition; but Jones said that Croke gave no reason to prove it; and by the other three judges judgment was given against the opinion of Croke. In *Estcourt v. Kingsro'e*, 4 Madd. 140, the *court would not presume a deal *783] creating a composition real, from payment of 20*l.* in lieu of tithes for two hundred years. And see *Seathome's case*, Dyer, 277, pl. 60; *The Bishop of Winchester's case*, 2 Co. Rep. 43 b; *The Archbishop of Canterbury's case*, 2 Co. Rep. 46; *Harpur's case*, 11 Co. Rep. 23; *Pigot v. Hearne*, Cro. El. 599; *Sydowne v. Holme*, Cro. Car. 422, more fully reported *Sir W. Jones*, 368; *Wilson v. Redman*, Hardres, 174, 190; *Compost v. —*, Ib. 315; *Page's case*, Ib. 322; *Ingolshy v. Wivell*, Ib. 381; *Bokenham v. Benfield*, 1 Com. Rep. 392; *Fox v. Bardwell*, 2 Com. Rep. 498, Bunb. 327; *Bury Corporation v. Evans*, 2 Com. Rep. 651, Bunb. 345; *Hick v. Woodson*, 2 Salk. 655; *Benning v. Dowce*, Bunb. 26; *Hanking v. Gay*, Ib. 37; *Clark v. Dashwood*, Ib. 66; *Lord v. Turk*, Ib. 122; *Lambert v. Cumming*, Ib. 138; *Fisher v. Dean and Chapter of Christchurch*, Ib. 209; *Hanson v. Fielding*, Ib. 214, Gilb. Eq. Rep. 325; *Charlton v. Charlton*, Bunb. 325; *Lamprey v. Rooke*, Ambl. 291; *Pratt v. Hopkins*, 7 Brown, P. C. 2d ed. 12; *Fasshaw v. Rotheram*, 1 Eden, 276, 294; *Nagle v. Edwards*, 3 Anst. 702; *Clavill v. Oram*, 4 Wood, T. C. 396, 4 Gwill. 354, Toll. 174, 3 Eagle & Y. 1369; * *Berncy v. Harvey*, 17 Ves. 119; *Meach v. Norbury*, 2 Price, 338; *Kingsmill v. Billingsley*, 3 Price, 465; *Ward v. Shepherd*, Ib. 608, 620, 624; *Warden and Minor Canons of St. Paul's, &c. v. Bishop of Lincoln*, 4 Price, 65; *Parsons v. Bellamy*, Ib. 190; *Armstrong v. Hewitt*, Ib. 216; *Dorman v. Sears*, 6 Price, 338; *Markham v. Tingle*, 11 Price, 126; *Donnison v. Elsley, McClel. & Y. 1*; *Earl of Carysfort v. Wells*, Ib. 600; *Norton v. Hammond*, 1 Y. & J. 94; *Prickett v. Honeyborne*, Ib. 135; *Young v. Merchant*, 3 Y. & J. 487; *Lediard v. Anstie*, Ib. 548; *Monck v. Huskisson*, 1 Simons, 23; *Page v. Wilson*, 2 Jac. & Walk. 513; *Humphrey v. Wagstaff*, 3 Russ. & M. 529; *Barnes v. Stuart*, 1 Younge & Coll. 119; Selw. N. P. title *Tithes*, II.

* The issue directed in *Clavill v. Oram*,—as appears from the report in 3 Eagle & Y. 1369—upon a claim of exemption from the payment of tithes in respect of lands derived from one of the larger abbeys dissolved by 31 H. 8, c. 13, consisted of two distinct parts—whether all the lands in the defendant's answer, mentioned, and declared to be tithe-free, were, from time whereof, &c., tithe-free, and until, and at the time of the dissolution of the monastery of Shafton, &c., part and parcel of the possessions of the said monastery, and have been, for the like time, held and enjoyed by the abbess and convent thereof freed and discharged of and from the payment of tithes of all corn, grain, hay, and other great and rectorial tithes,—and whether, from the time of the dissolution, the said lands have been held, and are now, exempt and discharged of and from the said tithes of corn, grain, hay, and other great and rectorial tithes."

*784] *IRVING v. MANNING and Another (in Error). Feb. 4.

A policy was effected upon a ship valued at 17,500*l.*, from China to Madras, while there, and back to China. The ship had originally been purchased by the owners for 11,000*l.*, and was, at the time of effecting the policy, together with her stores, seamen's wages, and other matters not constituting her permanent value, of the value to the plaintiffs of the sum mentioned in the policy. During the voyage, the ship was damaged by perils of the sea, so as to become incompetent to proceed on the voyage, unless repaired at an expense of not less than 10,500*l.*, and, being so repaired, she would have been worth a sum not exceeding 9000*l.*, which was her marketable value at the time of effecting the policy, and immediately before the damage.

Upon a special verdict finding the above facts, and also finding that a prudent owner, being uninsured, would not have repaired the vessel, and that she was duly abandoned:—Held, in affirmance of the judgment of the court below, that the underwriters were liable as for a total loss.

THIS was an action of assumpsit brought by the defendants in error, managing owners of a vessel called the *General Kyd*, against the plaintiff

in error, one of the directors, and chairman, of the Alliance Marine Insurance Company, under the provisions of an act of parliament, making the company liable to be sued in the name of their chairman.

The first count of the declaration was upon a policy of insurance for 3000*l.*, duly subscribed on behalf of the company, "lost or not lost, at and from China to Madras, while there, and back to China, not east of Hong Kong, with leave to call at the straits, upon any kind of goods and merchandises, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture, of and in the good ship or vessel called the General Kyd," &c. : "the said ship," &c., "goods and merchandises," &c., "for so much as concerned the assured, by agreement made between the assured and the company in that policy, were and should be rated and valued at 17,500*l.*:" the count then averred a total loss by perils of the sea. The second count was for money paid, the third for money had and received, the fourth for interest, and the fifth on an account stated.

*The defendant pleaded, to the first count, that the vessel was not wholly lost, in manner and form, &c. ; and to the last four, non assumpsit ; upon both of which pleas issue was joined. [*785]

The cause came on for trial before CRESWELL, J., at the sittings in Guildhall after Trinity term, 1844, when a verdict was found for the plaintiffs below, damages 3000*l.*, subject to a special case, upon which the court of Common Pleas, in Hilary term 1845, pronounced judgment for the plaintiffs below.(a) The case having been turned into a special verdict by consent, the record was now brought up to this court by writ of error.

The material facts stated in the special verdict were as follows :—

That the plaintiffs below effected with the said copartnership or company, the policy in the first count of the declaration mentioned, on their ship the General Kyd, for the purpose of *bond fide* covering and protecting themselves from the loss of the said ship, together with her stores, seamen's wages, and other matters not constituting part of the permanent value of the ship : that no insurance was effected by them on the freight of the ship on the said voyage : that the ship was of the burden of 1318 tons, was built originally, and at great expense, for, and employed in, the trade of the East India Company, and was, on the East India Company's ceasing to trade, sold to the plaintiffs below for 11,000*l.* :

That, at the time of the effecting of the said policy in the first count mentioned, the said ship was, together with her stores, seamen's wages, and other matters not constituting part of the permanent value of the ship, of the value to the plaintiffs below of 17,500*l.*, and was insured in the said sum of 17,500*l.*, as well upon the *voyage in the said first count mentioned, as upon other previous voyages : [*786]

That the plaintiffs below, and the several other parties in their behalf in the first count mentioned, were interested as therein set forth; and that the said ship set sail on the voyage in the declaration mentioned, as therein alleged:

That, during the risk, and while prosecuting the voyage in the policy mentioned, the ship was damaged by perils of the sea, so as to become incompetent to proceed on the said voyage, unless repaired as after mentioned:

That the necessary expenditure to repair such damage, so as to render the ship seaworthy, and competent to proceed on the said voyage, would have amounted to a sum not less than 10,500*l.*; and that, if such repairs had been done, and such expenditure had been incurred, the ship, being so repaired, would have been worth a sum not exceeding 9000*l.*, *which was her marketable value, as well at the time of effecting the policy, as also immediately before the said damage:*

That a prudent owner, being uninsured, would not have repaired the vessel: and that the vessel was duly abandoned to the underwriters.

The case now came on for argument, before POLLOCK, C. B., PARKE, B., ALDERSON, B., PATTESON, J., COLERIDGE, J., ROLFE, B., and WIGHTMAN, J.

Sir F. Kelly, Solicitor-General, (with whom were Channell, Serjt., and G. Lathom Browne,) for the plaintiffs in error. The loss found by this special verdict, was not, according to the law of England, a total loss within the meaning of the policy, so as to entitle the plaintiffs below to recover the full sum of 17,500*l.*; and, in deciding upon the facts here found, it will not be necessary to interfere in any degree with the doctrine *787] *laid down in the cases of *Allen v. Sugrue*, 8 B. & C. 561, 3 Mann. & R. 9, and *Young v. Turing*, 2 M. & G. 593, 2 Scott, N. R. 752. The insurance here is upon the ship alone, not upon the stores, &c., or the expenses incurred in respect of the particular voyage, or upon the freight; and the special verdict expressly finds that the insurance was effected by the plaintiffs below "for the purpose of *bond fide* covering and protecting themselves from the loss of the said ship, together with her stores, seamen's wages, and other matters not constituting the permanent value of the said ship." The value of the *thing insured* never was 17,500*l.* [POLLOCK, C. B. Why not?] The special verdict finds that the plaintiffs below had bought the ship for 11,000*l.*; and that, "at the time of effecting the policy, the ship was, together with her stores, seamen's wages, and other matters not constituting part of the permanent value of the ship, of the value to the plaintiffs below of 17,500*l.*" If, therefore, the owners are allowed to recover, under this policy, the full sum of 17,500*l.*, the first principle of insurance law—that the policy is a contract of indemnity only—will be overturned. [POLLOCK, C. B. Your argument tends to this—that there cannot be a valued policy. Your remarks do not at all touch the question of constructive total loss: every one

of them would just as well apply, if the ship had gone to the bottom of the sea.] The doctrine of constructive total loss ought not to be applied to the case of a valued policy, which is recognised by law merely because it is presumed to have been entered into *bonâ fide*, and not as a wager policy. [POLLOCK, C. B. Assuming your argument to be well founded, we cannot, sitting here, overturn a deliberate judgment of the court of King's Bench in *Allen v. Sugrue*, recognised and confirmed by [*788 *this court in *Young v. Turing*. PARKE, B. If there be any practical inconvenience in policies of this description, the underwriters have the remedy in their own hands. They probably find it to their interest to enter into them.] To affirm this judgment, will be going a step beyond the principle laid down in the cases referred to. [POLLOCK, C. B. If the vessel is so injured by a peril insured against as to be useless to the owner, except at an expense that no prudent man, if uninsured, would incur—an expense far exceeding her value when repaired—that is to all intents and purposes a total loss.]

Sir *T. Wilde*, Serjt., (with whom was *Greenwood*,) *contrâ*, were stopped by the court.

POLLOCK, C. B. We think this case is governed by the doctrine laid down by the court of King's Bench in *Allen v. Sugrue*, to which we are disposed to adhere. Any arguments, therefore, tending to impeach the propriety of that decision, would, we think, be better addressed to the House of Lords.

Judgment affirmed.

END OF HILARY VACATION.(a)

(a) For the cases determined in this vacation upon appeals from the decisions of revisiting barristers, see *antè*, 197, 248.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
IN
Easter Term,
IN THE NINTH YEAR OF THE REIGN OF VICTORIA.

The judges who usually sat in banco in this term, were,
TINDAL, C. J. CRESSWELL, J.
COLTMAN, J. ERLE, J.

REGULÆ GENERALES.

DIRECTIONS TO THE TAXING OFFICERS.

“ORDERED, that the directions to the taxing masters be altered by inserting, after the words ‘action of assumpsit, debt, or covenant,’ the words ‘other than cases wherein, by reason of the nature of the action, no writ of trial can by law be issued.’”(a)

***790] *EXAMINATION AND ADMISSION OF ATTORNEYS.**

**NEW RULES OF THE COURTS OF COMMON LAW, FOR THE EXAMINATION
AND ADMISSION OF ATTORNEYS.**

WHEREAS, by sect. 15 of the statute 6 & 7 Vict. c. 73, it was enacted “that it shall be lawful for the judges of the courts of Queen’s Bench, Common Pleas, and Exchequer, or any one or more of them, and he and they is and are hereby authorized and required, before he or they shall issue a fiat for the admission of any person to be an attorney, to examine

(a) The above was delivered on the 21st of April, 1846, by Coltman, J., to one of the masters of this court, with instructions to communicate it to the officers of the other courts; which he accordingly did.

and inquire, by such ways and means as he or they shall think proper, touching the articles and service, and the fitness and capacity of such person to act as an attorney; and, if the judge or judges as aforesaid shall be satisfied, by such examination, or by the certificate of such examiners as hereinafter mentioned, that such person is duly qualified and fit and competent to act as an attorney, then, and not otherwise, the said judge or judges shall, and he and they is and are hereby authorized and required to, administer, or cause to be administered, to such person, the oath hereinafter directed to be taken by attorneys and solicitors, in addition to the oath of allegiance, and, after such oaths taken, to cause him to be admitted an attorney of such court:" and by sect. 16 of the said statute, it was enacted, for the purpose of facilitating the inquiry touching the due service under articles as aforesaid, and the fitness and capacity of any person to act as an attorney, "that it shall be lawful for the judges of the court of Queen's Bench, Common Pleas, and Exchequer (or any eight or more of them, of whom the chiefs of the said courts shall be three,) *from time to time, to nominate and appoint such persons to be examiners for the purposes aforesaid, and to make such rules and regulations for conducting such examinations, as such judges shall think proper:" [791

And whereas, in order to carry the said statute more fully into effect, it is expedient annually to appoint examiners, subject to the control of the judges in manner hereinafter mentioned :

It is ordered, that the several masters for the time being for the courts of Queen's Bench, Common Pleas, and Exchequer, respectively, together with sixteen attorneys or solicitors, be appointed by a rule of court in every year, to be examiners for one year, any five of whom (one whereof to be one of the said masters) shall be competent to conduct the examination; and that, subject to such appeal as hereinafter mentioned, no person who shall not have been previously admitted a solicitor of the high court of Chancery, shall be admitted to be sworn an attorney of any of the courts, except on production of a certificate, signed by the major part of such examiners actually present at and conducting his examination, testifying his fitness and capacity to act as an attorney; such certificate to be in force only to the end of the *term next but one following* the date thereof, unless such time shall be specially extended by the order of a judge.

2. It is further ordered that the examiners so to be appointed shall conduct the said examinations under regulations to be first submitted to and approved by the judges.(a)

3. And it is further ordered, that, in case any person shall be dissatisfied with the refusal of the examiners to grant such certificate, he shall be at liberty to apply for admission, by petition in writing to the judges, to be *delivered to the clerk of the Lord Chief Justice of the [792

court of Queen's Bench, upon which no fee or gratuity shall be received, which application shall be heard in Serjeant's Inn Hall, by not less than three of the judges.

4. And whereas the hall of building of The Incorporated Law Society of the United Kingdom, in Chancery Lane, will be a fit and convenient place for holding the said examinations; and the said society have consented to allow the same to be used for that purpose: It is further ordered, that, until further order, such examinations be there held, on such days as the said examiners, or any five of them, shall appoint: and that any person not previously admitted an attorney of any of the three courts, and desirous of being admitted, shall, in addition to the notices already required, give a term's notice to the said examiners, of his intention to apply for examination, by leaving the same with the secretary of the said society, at their said hall: which notice shall also state his place or places of residence or service for the last preceding twelve months: and, in case of application to be admitted, on a refusal of the certificate, shall give ten days' notice, to be served in like manner, of the day appointed for hearing the same.

5. And it is further ordered, that, three days at the least before the commencement of the term next preceding that in which any person not before admitted shall propose to be admitted an attorney of either of the courts, he shall cause to be delivered at the Master's office, instead of affixing the same on the walls of the courts, the usual written notices, which shall state, in addition to the particulars now required, his place or places of abode or service for the last preceding twelve months, and the Master shall reduce all such notices as in this rule mentioned, into an alphabetical table or tables, under convenient heads, and affix the same, *793] on *the first day of term, in some conspicuous place within or near to and on the outside of each court:

And such person shall, also, for the space of one full term previous to the term in which he shall apply to be admitted, enter or cause to be entered, in two books kept for that purpose, one at the chambers of the Lord Chief Justice, or Chief Baron, of the court in which he applies to be admitted, and the other at the chambers of the judges, or barons, of such court, his name and place or places of abode, and also the name or names and place or places of abode of the attorney or attorneys to whom he shall have been articulated:

And it is further ordered, that a printed copy of the list of admissions be stuck up in the Queen's Bench, Common Pleas, and Exchequer offices, and at the judges' hall or chamber of each court, in Rolls Garden.

(Signed)	DENMAN.	J. PATTESON.	W. WIGHTMAN.
	N. C. TINDAL.	J. WILLIAMS.	C. CRESSWELL.
	F. POLLOCK.	T. COLTMAN.	W. ERLE.
	J. PARKE.	R. M. ROLFE.	T. J. PLATT
	E. H. ALDERSON.		

REGULATIONS APPROVED BY THE JUDGES, IN EASTER TERM, 1846, FOR THE EXAMINATION OF PERSONS APPLYING TO BE ADMITTED AS ATTORNEYS OF THE COURTS OF QUEEN'S BENCH, COMMON PLEAS, OR EXCHEQUER, PURSUANT TO THE RULE OF COURT MADE IN EASTER TERM, 1846.

Whereas, by a rule of the courts of Queen's Bench, Common Pleas, and Exchequer, made in Easter term, *1846, it was ordered, "that the [*794 several masters for the time being of the said courts respectively, together with sixteen attorneys or solicitors, should be appointed, by a rule of court in every year, to be examiners, for one year, of persons applying to be admitted attorneys of the said courts, any five of whom (one whereof to be one of the said masters) should be competent to conduct the examination, and that, subject to such appeal as thereafter mentioned, no person not previously admitted a solicitor of the high court of Chancery, shall be admitted to be sworn an attorney of any of the said courts, except on production of a certificate, signed by the major part of such examiners actually present at and conducting his examination, testifying his fitness and capacity to act as an attorney; such certificate to be in force only to the end of the term next but one following the date thereof, unless such time should be specially extended by the order of a judge;" and it was further ordered, "that the examiners so to be appointed should conduct the said examinations under regulations to be first submitted to and approved by the judges; and that, until further order, such examinations should be held in the hall or building of The Incorporated Law Society of the United Kingdom, in Chancery Lane, on such days as the said examiners, or any five of them, should appoint; and that any person not previously admitted of any of the three courts, and desirous of being admitted, should give a term's notice of his intention to apply for examination, by leaving the same with the secretary of the said society, at their said hall:"

In pursuance of the said rule, the following regulations for conducting the said examinations have been submitted to and approved by the judges of the said courts:—

*1. That every person applying to be admitted an attorney of [*795 any of the said courts, pursuant to the said rules, shall, within the first seven days of the term in which he is desirous of being admitted, leave, or cause to be left, with the secretary of the said Incorporated Law Society, his articles of clerkship, duly stamped, and also any assignment which may have been made thereof, together with answers to the several questions hereunto annexed, signed by the applicant, and also by the attorney or attorneys with whom he shall have served his clerkship:

2. That, in case the applicant shall show sufficient cause, to the satisfaction of the examiners, why the first regulation cannot be fully complied with, it shall be in the power of the said examiners, upon sufficient proof

being given of the same, to dispense with any part of the first regulation that they may think fit and reasonable :

3. That every person applying for admission shall also, if required, sign and leave, or cause to be left with the secretary of the said society, answers in writing to such other written or printed questions as shall be proposed by the said examiners touching his said service and conduct ; and shall also, if required, attend the said examiners personally, for the purpose of giving further explanations touching the same ; and shall also, if required, procure the attorney or attorneys with whom he shall have served his clerkship as aforesaid to answer, either personally or in writing, any questions touching such service and conduct, or shall make proof to the satisfaction of the said examiners of his inability to procure the same :

4. That every person so applying shall also attend the said examiners at the hall of the said society, at such time or times as shall be appointed *796] for that purpose, *pursuant to the said rule, as the said examiners should appoint, and shall answer such questions as the said examiners shall then and there put to him, by written or printed papers, touching his fitness and capacity to act as an attorney :

5. That, upon compliance with the aforesaid regulations, and if the major part of the said examiners actually present at and conducting the said examination (one of them being one of the said masters) shall be satisfied as to the fitness and capacity of the person so applying to act as an attorney, the said examiners so present, or the major part of them, shall certify the same under their hands, in the following form, viz. :

“ In pursuance of the rule made in Easter term, 1846, of the courts of Queen’s Bench, Common Pleas, and Exchequer, We, being the major part of the examiners actually present at, and conducting the examination of A. B., of, &c., Do hereby certify that we have examined the said A. B. as required by the said rules ; And we do testify that the said A. B. is fit and capable to act as an attorney of the said courts.”

Questions, as to due Service, to be answered by the Clerk.

1. What was your age at the date of your articles ?
2. Have you served the whole term of your articles at the office where the attorney or attorneys to whom you were articled or assigned carried on his or their business ? And, if not, state the reason.
3. Have you, at any time during the term of your articles, been absent, without the permission of the attorney or attorneys to whom you were articled or assigned ? And, if so, state the length and occasions of such absence.
4. Have you, during the period of your articles, been engaged or concerned in any profession, business, or employment other than your professional employment *as clerk to the attorney or attorneys to whom you were articled or signed ? *797]

5. Have you, since the expiration of your articles, been engaged or concerned, and for how long time, in any and what profession, trade, business, or employment, other than the profession of an attorney or solicitor.

Questions to be answered by the Attorney, Agent, Barrister, or Special Pleader, with whom you may have served any Part of your Time under your Articles.

1. Has A. B. served the whole time of his articles at the office where you carry on your business? And, if not, state the reason.

2. Has the said A. B., at any time during the term of his articles, been absent without your permission? And, if so, state the length and occasions of such absence.

3. Has the said A. B., during the period of his articles, been engaged or concerned in any profession, business, or employment, other than his professional employment as your articulated clerk?

4. Has the said A. B., during the whole term of his clerkship, with the exceptions above-mentioned, been faithfully and diligently employed in your professional business of an attorney or solicitor?

5. Has the said A. B., since the expiration of his articles, been engaged or concerned, and for how long time, in any, and what, profession, trade, business, or employment, other than the profession of an attorney or solicitor?

"And I do hereby certify that the said A. B. has duly and faithfully served under his articles of clerkship [*or assignment as the case may be,*] bearing date, &c., "for the term therein expressed; and that he is a fit and proper person to be admitted an attorney." [*798]

(Signed) DENMAN.

J. WILLIAMS.

N. C. TINDAL.

T. COLTMAN.

F. POLLOCK.

R. M. ROLFE.

J. PARKE.

W. WIGHTMAN.

E. H. ALDERSON.

C. CRESSWELL.

J. PATTESON.

RENEWAL, &c., OF ATTORNEYS' CERTIFICATES.

Whereas, by sect. 25, of the statute 6 & 7 Vict. c. 73, it was enacted, "that, if any attorney shall neglect to procure an annual stamped certificate authorizing him to practise as such, within the time by law appointed for that purpose, then, and in such case the registrar of attorneys and solicitors shall not afterwards grant a certificate to such attorney, without the order of one of the courts of Queen's Bench, Common Pleas, or Exchequer, or of one of the judges thereof, to issue such certificate."

And whereas it is expedient, that, upon the application of an attorney

having neglected, for the space of one whole year, to procure or to renew an annual stamped certificate, the judges should have means of inquiring as to the circumstances under which he has omitted to commence, or has discontinued to practise, and as to his conduct and employment during the term of such omission or discontinuance.

It is ordered, that, from and after the last day of Trinity term next, every person who shall intend to apply, on the last day of term, or in vacation, for such order, shall, three days at the least previous to the first *799] *day of the term on the last day of which the application is intended to be made, or in case the application is to be made in vacation, shall, previously to the first day of the preceding term, leave at the office of the masters of the court in which he intends to make the application, a notice in writing containing his name and place or places of abode for the last preceding twelve months; and that, before the said first day of term, he shall enter, or cause to be entered, a like notice, in two books kept for that purpose, one at the chambers of the lord chief justice or lord chief baron, and the other at the chambers of the other judges or barons; and shall, before the said first day of term, cause to be filed the affidavit upon which he seeks to obtain or renew his said certificate, at the office of the masters aforesaid; and a copy thereof to be also left at the chambers of the lord chief justice of the court of Queen's Bench.

And it is further ordered that the masters reduce such notices into alphabetical order, and add the same to the list of admissions: and the order for the granting the certificate shall be drawn up on reading such affidavit, and also an affidavit of such copy having been left in compliance with this rule.

(Signed)

DENMAN.

T. COLTMAN.

N. C. TINDAL.

R. M. ROLFE.

F. POLLOCK.

W. WIGHTMAN.

J. PARKE.

C. CRESSWELL.

E. H. ALDERSON.

W. ERLE.

J. PATTESON.

T. J. PLATT.

J. WILLIAMS.

*800]

*PAUL v. DOD and HOLMES. April 16.

A. sells goods to B., to be paid for partly in cash, and the residue by bills at intervals of three months each:—The payment of the money and the delivery of the bills do not constitute a condition, so as to entitle A. upon non-payment of the money and non-delivery of the bills, to sue as for goods sold and delivered, without waiting the expiration of the credit. Nor can such action be maintained for the amount of the stipulated cash payment. A.'s remedy is, by special action on the express contract.

DEBT, for goods sold and delivered, work and labour and materials, money paid, and money found due upon an account stated.

The defendants severally pleaded, never indebted.

The cause was tried before Lord DENMAN, C. J., at the last assizes at Kingston. The facts were as follow: The defendant Dod, in the early part of the year 1845, applied to the plaintiff, an upholsterer, to complete the decoration and furnishing of a house in his occupation, called Dagnell's Park, near Croydon. The plaintiff declined to do so without security; whereupon the defendant Holmes was offered and accepted as Dod's surety. The estimated value of the goods to be supplied at first was between 80*l.* and 100*l.*, which it was agreed should be paid 30*l.* in cash, and the residue by bills of 30*l.* each succeeding three months. Subsequently, however, the order was, with the assent of Holmes, extended to 244*l.* By the direction of Holmes, the goods were invoiced to Dod and himself jointly. The 30*l.* were not paid, nor were any bills given. The last supply took place on the 2d of April, 1845. The action was commenced on the 6th of January, 1846.

On the part of the defendants, it was objected—first, that there was no evidence of any joint contract by the two—and, secondly, that the action was prematurely brought, inasmuch as the full period of credit agreed on had not expired: and Lord DENMAN, yielding to the objections, nonsuited the plaintiff, reserving to him leave to move to enter a verdict, if the court should be of opinion that the goods were furnished and the work done on the *joint credit* of the two defendants; and for *such sum as upon the evidence they might think the plaintiff entitled to; [801 the court to be at liberty to draw any inference of fact that the jury might under the circumstances have drawn.

Channell, Serjt., now moved accordingly. In general, where goods are sold, to be paid for by bill at a given date, the contract is considered to be a contract for a credit commensurate with the date of the proposed bill; and the vendor's remedy is, by an action for a breach of the contract in not giving the bill, or by an action for goods sold and delivered at the expiration of the agreed credit: *Mussen v. Price*, 4 East, 147; *Brooke v. White*, 1 N. R. 330; *Dutton v. Solomonson*, 3 B. & P. 582.(a) But, where the sale is subject to a condition, as here, the vendor has an immediate right of action, if the vendee neglects to perform the condition which alone was to entitle him to credit. Thus, in *Stedman v. Gooch*, 1 Esp. N. P. C. 3, Lord KENYON ruled, that, "if, in payment of a debt, the creditor is content to take a bill or note payable at a future day, he cannot legally commence an action on his original debt, until such bill or note becomes payable, or default is made in the payment; but that, if such bill or note is of no value, as, if, for example, drawn on a person who has no effects of the drawer's in his hands, and who therefore refuses

(a) And see *Lee v. Riedon*, 7 Taunt. 188, 2 Marsh. 495; *Campbell v. Sewell*, 1 Chitt. R. 609; *Ferguson v. Carrington*, 9 B. & C. 59, 3 C. & P. 457; *Heron v. Granger*, 5 Esp. N. P. C. 269; *Hoskins v. Duperoy*, 9 East, 498, 6 Esp. N. P. C. 38; *Marshall v. Poole*, 13 East, 98; *Helps v. Winterbottom*, 2 B. & Ad. 403.

it, in such case he may consider it as waste paper, and resort to his original demand, and sue the debtor on it." So, in *Nickson v. Jepson*, 2 Stark. N. P. C. 227, it was held, that, where goods are sold at three months' credit, the vendor agreeing, if the vendee should want further *802] time, to take his "bill at three months' date at the end of the first three months; unless the vendee give such a bill, although before the end of the first three months, the vendor may bring his action immediately. Lord ELLENBOROUGH there said: "The plaintiff had agreed, if the defendant wished it, to give further time, but the defendant was to give to the plaintiff his bill at three months as the price of that indulgence. It was incumbent upon him to give such bill, if he wished to avail himself of the indulgence offered to him." Here, the contract was, to pay 30*l.* in cash, and to give bills for the residue, for 30*l.*, payable each succeeding three months. Upon breach of that condition, the plaintiff was at once entitled to sue for the whole. At all events, he is entitled to a verdict for that portion of the demand in respect of which the credit has, by the terms of the contract, expired.

TINDAL, C. J. I think there ought to be no rule in this case. No part of the goods can be singled out for payment by cash. The contract was, to pay for the entire goods, 30*l.* in cash, and the residue by instalments of 30*l.* at each succeeding three months, to be secured by bills. The plaintiff should have declared upon the special contract; under which the defendants would have been clearly liable. He cannot, however, maintain an action upon an implied contract, until the expiration of the period at which the entire debt would have become due. The case of *Nickson v. Jepson* does not apply. There, the extended credit of three months was subject to a condition to be performed on the part of the defendant. Not having performed that condition, his right to such extended credit never accrued.

COLTMAN, J. The payment of the 30*l.* was not, as has been contended by my brother Channell, a condition. The agreement was, simply, that the defendant should *803] pay 30*l.* in cash, and the rest of the debt by bills at certain intervals. The action, therefore, was brought too soon.

CRESSWELL, J. I am of the same opinion. It is impossible to say that any particular portion of these goods was sold for a money payment. I agree with the view taken by my brother COLTMAN, that the credit was not conditional upon the payment of the 30*l.* in cash. It was one entire contract for a cash payment of 30*l.*, with a certain credit for the residue.

ERLE, J. I also am of opinion that this was one entire contract upon one consideration, and one entire promise. The payment of the 30*l.* was not a condition.

Rule refused.

SAMUEL HOWARD, Executor of J. C. HOWARD, deceased, v. DANBURY. *April 16.*

A., in 1837, transferred 1000*l.* in the 4 per cents. to B., who possessed other stock of the same description. B., after some years, sold out all his stock, including the 1000*l.* B. made payments to A. equal to interest at 5 per cent. upon that sum until A.'s death. After the death of A., her executor wrote to B. referring to the transaction as a loan of money: B., in reply, asserted that he was employed by A. to purchase an annuity for her, and that he had done so. No purchase of an annuity was proved:—*Held*, that there was evidence to go to the jury in support of a count for money lent.

ASSUMPSIT. The first count of the declaration stated a special contract by the defendant, in consideration that the testatrix would transfer to him 1000*l.* new 4 per cent. bank annuities standing in her name in the books of the governor and company of the Bank of England, to pay to her, her executors or administrators, on request, so much as the said stock should, at the time of such transfer, be reasonably worth, and interest at 5 per cent. per annum from the time of the transfer until payment; and alleged that the stock was transferred to, and accepted by, the defendant, and was of the value of 1000*l.*, and assigned for breach the non-payment of that sum and interest from the 24th of February, 1843. [*804]

There were also an *indebitatus* count for stock bargained, sold, and transferred by the testatrix to the defendant, and counts for money lent, interest, money had and received, and money found due upon an account stated with the testatrix, and a count for interest accrued since her death.

The defendant pleaded non assumpsit and several other pleas, upon which issues were joined.

At the trial before TINDAL, C. J., at the sittings in London after the last term, it appeared that the testatrix, in the year 1837, transferred to the defendant 1000*l.* new 4 per cent. bank annuities, which were then nearly at par; that, for some years, and until the death of the testatrix, the defendant paid her, quarterly, sums equivalent to interest at 5*l.* per cent. upon that sum; and that, in the course of several years, the defendant sold out all the stock of that description standing in his name in the books of the governor and company of the Bank of England, including the stock in question. There was no evidence of any contract on the part of the defendant to replace the stock. In support of the action, a letter from the plaintiff to the defendant, dated the 29th of March, 1843, with the defendant's answer thereto, dated the 31st, was produced. The letter of the plaintiff was as follows:—

“Sir,—I write to let you know that my dear sister is no more. She departed this life on the 26th of March, 1843. Eighteen years she lived with me, and the last six years very unhappy; and I leave you to judge the cause, as I well know myself. It was respecting the .. [*805]

money lent to you. When she first came to live with me, she had 1000*l.* in the new 4 *per cent.* stock, which she told me that she could not live on the interest, which was 40*l.* per year; and that she knew a friend that would give her 5 *per cent.* interest for the same; and that he would give her land security for the same. I told her, if she could not live on the 40*l.*, if she could get 50*l.* from him, with good security for the safety of the principal, I thought she could not do better. You know whether this statement is true, as well as me. All I can say, is, act with honour and justice!"

The defendant's answer to this letter was as follows:—

"Sir,—In reply to your communication of the 29th instant, I have only to say, that at the earnest request of the late Mrs. Howard, I succeeded in obtaining for her a life annuity of 50*l.* *per annum*, which was regularly paid to her every quarter, as her receipts will show: and that now ceases. But, if there is a quarter, or part of a quarter, due on the said annuity, it will be paid to her heir-at-law, on application for the same."

A nonsuit being applied for and refused, the plaintiff abandoned the special count, and took a verdict for 1149*l.* 9*s.* 2*d.* on the counts for money lent and interest.

Manning, Serjt., now moved for a new trial, on the ground that there was no evidence to support the verdict. He submitted that there was no evidence applicable to the count for money lent. The real transaction between the parties was not before the jury; but the transaction, as it appeared at the trial, was a mere transfer of stock. [CRESSWELL, J. Might it not be a loan of stock, with power to the transferee to turn it *806] into a loan of money?] It might have been so, if the evidence *had shown any such election on the part of the transferee. All that appeared, however, was a transfer to the defendant of 1000*l.* stock. [EARLE, J. A transfer of land has been held to be payment of a note: so, proof of a delivery of hats has been held sufficient to support a plea of payment—the intention of the parties being apparent that the transaction should be taken as payment.] There was no evidence here to show that this was intended by the parties, or treated by them, as an advance of money. A loan of stock may be accompanied with an engagement to pay interest on the money-value of the stock, or the amount of the dividends which the lender would have been entitled to receive. In either case, the lender would be entitled to call upon the borrower to replace the stock upon the termination of the loan. If a loan of money had been contemplated, the lender, instead of transferring the stock into the name of the borrower, would have executed a power of sale. So far was this from being treated as a loan of money that the stock remained standing in the name of the defendant, for more than a year after the transfer.

TINDAL, C. J. The question in this case is, whether there was evi-
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dence to go to the jury in support of the count for money lent. Looking at all the circumstances, it seems to me that there was abundant evidence to warrant the jury in finding that this was a loan of money. It is quite clear the parties contemplated a contract for money lent. This is sufficiently apparent from the letter of the 29th of March, 1843, and the defendant's answer thereto. The former treats the transaction as a loan of money: and the answer does not deny that it was so,^(a) but rests the defence upon that *which appears to have been unfounded in point of fact. One can readily understand, that, when applied [^{*807} to for a loan of 1000*l.*, the testatrix might have replied that she had no money, but that she had 1000*l.* stock, which the defendant might take instead. It appeared that the stock was transferred to the defendant's name, and afterwards sold out by him, and that he regularly paid her interest at the rate of 5 *per cent.* on that sum. That surely was evidence to go to the jury. In *Harrington v. Macmorris*, 5 Taunt. 228, upon an allegation of a loan of *lawful money of Great Britain*, it was held to be no variance, that the loan was proved to have been of foreign coin. We must look at the substance of the transaction.

COLTMAN, J. I also think there was sufficient evidence in this case to support the count for money lent. The argument of my brother *Manning* assumes that there was nothing in the case but a transfer of the stock. That, however, is only a circumstance. Combined with the other facts, the letter of the 29th of March, and the defendant's answer thereto, in my opinion, warranted the jury in coming to the conclusion that the transaction was no other than a loan of money.

CRESSWELL, J. I agree with the rest of the court in thinking that there was evidence enough to warrant the jury in finding that this was an agreement for a loan of money. There was nothing to prevent the parties from treating the transaction as a loan, if they were so minded.

ERLE, J., concurred.

Rule refused.

(a) It does not in terms deny a loan, but it gives a different version of the transaction, inconsistent, it would seem, with the existence of the alleged loan. Vide *suprà*, 805.

*SOUCH v. STRAWBRIDGE. April 21.

[^{*808}

A contract for the maintenance of a child at the defendant's request, to enure "so long as the defendant shall think proper," is a contract upon a contingency, the performance of which is not necessarily to take place beyond the space of a year, and therefore not within the 4th section of the statute of frauds.

Semble, per Tindal, C. J., that the statute does not apply where the action is brought upon an executed consideration.

ASSUMPSIT for board, lodging, &c., supplied by the plaintiff to a child, at the request of the defendant. Plea, non assumpsit.

The cause was tried before ERLE, J., at the last summer assizes at Bristol. It appeared that the child—of which it was *suggested* that the defendant was the father—was placed by him under the care of the plaintiff shortly after its birth, in 1842, and that the defendant agreed to pay for its maintenance 5s. per week, or one guinea per month. At first it was proposed that the plaintiff should keep the child for one year; but the defendant objected to that, on the ground that 5s. per week was too much for so young a child; and, ultimately it was settled that the child should remain with the plaintiff “until Strawbridge gave notice,” or, in the language of another witness, “as long as Strawbridge should think proper.” The child remained with the plaintiff until February, 1845. The defendant paid for one month himself, and afterwards gave or sent the money to the child’s mother, that she might pay it. The action was brought to recover a balance of 15*l.*

On the part of the defendant, it was objected that the contract, not being in writing, nor to be performed within the space of one year from the making thereof, was void by the statute of frauds. The learned judge nonsuited the plaintiff, reserving to him leave to move to enter a verdict for 15*l.*, if the court should be of opinion that the contract was not within the statute.

Sir T. Wilde, Serjt., in Michaelmas term last, obtained a rule nisi accordingly.

*809] **Manning*, Serjt., now showed cause. The fourth section of the statute 29 Car. 2, c. 3, enacts that no action shall be brought whereby to charge the defendant “upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.” And the cases have decided that the statute requires a *complete* performance within the year. [TINDAL, C. J. The child might have died within a year.] So might an apprentice. [MAULE, J. An agreement to leave money by will need not be in writing, though uncertain as to the time of performance: *Fenton v. Emblers*, 3 Burr. 1278, 1 W. Bla. 353.] The parties clearly contemplated that this contract should not be completed within a year. In *Snelling v. Lord Huntingfield*, 1 C., M. & R. 20, 4 Tyrwh. 606, A., on the 20th of July, made proposals in writing, unsigned, to B. to enter A.’s service as bailiff, for a year. B. took the proposals and went away, and entered into A.’s service on the 24th of July: and it was held that this was a contract on the 20th, not to be performed within a year, and therefore within the fourth section of the statute of frauds. So, in *Burch v. The Earl of Liverpool*, 9 B. & C. 398, 4 M. & R. 380, it was held that an agreement to hire a carriage for more than one year, determinable at any time upon payment of a year’s hire, is an agreement *not* to be performed within one year from the making thereof,

and must be signed by the party to be charged therewith. There, the contract was not necessarily to endure for more than one year. The *rule as laid down by the majority of the judges, in *Peter v. Comp-ton*, Skinner, 353, is: "Where the agreement is to be performed [810 upon a contingency, and it does not appear on the face of the agreement that it is to be performed after the year, there a note in writing is not necessary, for, the contingency might happen within the year; but, where it appears from the whole tenor of the agreement that it is to be performed after the year, then a note in writing is necessary." In *Boydell v. Drummond*, 11 East, 142, it was held, that, if it appear to have been the understanding of the parties to a contract at the time that it was not to be completed within a year, though it might be, and was in fact, in part performed within that time, it is within the fourth section of the statute of frauds, and, if not in writing, signed by the party to be charged, &c., it cannot be enforced against him. Lord ELLENBOROUGH there says: "It has been argued that an inchoate performance within a year is sufficient to take the case out of the statute; but the word used in the clause of the statute is, *performed*, which *ex vi termini* must mean the complete performance or consummation of the work: and that is confirmed by another part of the statute, requiring only part-performance of an agreement to supersede the necessity of reducing it to writing; which shows, that, when the legislature used the word *performed*, they meant a complete and not a partial performance." [CRESSWELL, J. For how long a period beyond a year did the plaintiff contract to keep this child, and the defendant to pay for its maintenance?] For no specific period. [CRESSWELL, J. How, then, can it be said to be a contract that is not to be performed within one year?] In *Boydell v. Drummond*, no specific time beyond the year was agreed upon for the performance of the contract. [CRESSWELL, J. The work was *to be supplied annually.] In *Brace-girdle v. Heald*, 1 B. & Ald. 722, Lord ELLENBOROUGH says: "The [811 legislature has declared, in clear and intelligible terms, that any agreement that is not to be *performed* within the space of one year from the making thereof, shall be in writing. That brings it to the question, what is the meaning of the word *performed*? will an inchoate performance or a part execution satisfy the terms of the statute? I am of opinion that it will not, and that there must be a full, effective, and complete performance." In *Wells v. Horton*, 4 Bingh. 40, 12 J. B. Moore, 176, it was held, that, where an agreement is to be performed on a contingency which may happen within the year after it is made, and it does not appear on the face of the agreement that it is to be performed after the year, it does not fall within the statute. [TINDAL, C. J. That comes very near to this case.] There was nothing in that case to show that the parties contemplated a performance of the contract after the year. In the present case, however, the probability of the child being supported beyond the year, was clearly in the minds of the parties at the time of making the agree-

ment. [TINDAL, C. J. You must bear in mind that this action is brought upon an *executed* contract.] The defendant is charged upon an *express* contract. If that be rejected, what remains? The action is then an action against a stranger in respect of the maintenance of the child of a married woman, not living separate from her husband, of which he is the supposed father. [CRESSWELL, J. The child being supported by the plaintiff at the defendant's request.] There was no request, apart from the express contract, proved. [TINDAL, C. J. If a man enters into a contract to serve another for two years, no action will lie for a non-per-
*812] formance of that contract, unless it be *reduced into writing. But, if the service has been performed under it, an action for work and labour will lie.] The acceptance of the service is an acknowledgment of the contract binding the master. Here, there was no acquiescence in the service performed either during its continuance or after its close,—no evidence whatever to affect the defendant, beyond the express contract entered into at the time the child was first placed under the plaintiff's care.

Sir T. Wilde, Serjt., in support of the rule. The defendant, being under a moral obligation to support his illegitimate child, engaged the plaintiff to take charge of it at a certain price, upon an understanding that it was to continue under the plaintiff's care as long as the defendant should think proper. Something was said about continuing beyond a year; but there was nothing binding; either party might have given up the engagement at the end of a month. Suppose the contract had been for the keep of a horse for so long time as the defendant might choose to keep it at the plaintiff's stables, would that have been within the statute? The contract having been performed by the plaintiff at the continued request of the defendant, the case is wholly beside the authorities that have been cited. To bring the case within the statute, it must appear that the contract is *not* to be performed within the year, as in *Boydell v. Drummond*. In *Wells v. Horton*, the contract was held not to be affected by the statute, inasmuch as it *might* be performed within the year. In *Bracegirdle v. Heald*, on the other hand, the contract contemplated a performance beyond the year, and therefore *was* within the statute. The rule is very accurately stated in a note to the case of *Burch v. The Earl of Liverpool*, 4 Mann.
*813] & R. 382, thus: "The statute extends to all *contracts which are not to be carried into full, effective, and complete execution within the space of one year from the making thereof. The word 'performed' does not signify an inchoate performance, or part execution of the agreement; and the provisions of the statute render a parol contract void, if it appear to have been the express understanding of the parties at the time, that it was not to be *completed* within a year; though it might be, and was in fact, in part performed within that period.(a) But contracts which may or may not happen to be performed within a year, have been held

(a) Chitt. jun. on Contracts, p. 309.

not to be within the statute. Thus, an agreement to leave money by will need not be in writing, though uncertain as to the time of performance.(a) So, a parol promise, to be performed on a contingency,—as, to pay so much money on the return of such a ship,—is not within the statute, though the ship do not arrive within a year.”(b) Here, inasmuch as there was nothing to show that the contract was *not* to be performed within a year, and as the defendant has the option of determining it at any time, the case is not within the statute. Besides, as the consideration is executed, and the defendant has had the benefit of, and has acquiesced in the performance of the contract on the plaintiff’s part, he is liable in this form of action.

TINDAL, C. J. I am of opinion that the rule for entering a verdict for the plaintiff in this case must be made absolute. In the first place, it appears to me that this is not an action which is within the prohibition of the *statute. It is brought for a by-gone or executed consideration, viz. the support and maintenance of a child at the request [*814 of the defendant. There was evidence enough to show that the child was placed under the care of the plaintiff at the charge of the defendant, with his assent, and that he had made payments on account of its maintenance. That is equivalent to the proof that is ordinarily given in an action for goods sold and delivered, whence the law implies a promise on the defendant’s part to pay for them. The fourth section of the statute of frauds enacts, that no action shall be brought whereby to charge the defendant “upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.” The meaning of that is, that no action shall be brought to recover damages in respect of the *non-performance* of such contracts as are therein referred to. The statute was directed to a totally different object than the prevention of an action like the present: its design was, to prevent the setting up, by means of fraud and perjury, of contracts or promises by parol, upon which parties might otherwise have been charged for their whole lives; and for that purpose it requires that certain contracts shall be evidenced only by the solemnity of writing. It has no application to an action in the present form, founded upon an executed consideration. But, assuming that the fourth section of the statute of frauds does apply to actions upon considerations that are executed, it seems to me that the contract in the present case is not within its terms. It speaks of “any agreement that is not to be performed within the space of one year from the making thereof;”

(a) *Fenton v. Emblers*, 3 Burr. 1278, 1 W. Bl. 353.

(b) *Anonymous*, 1 Salk. 280. And see *Peter v. Compton*, Skinn. 353; *Smith v. Westall*, 1 Ld. Raym. 316; Selw. N. P., 7th ed. 839; Chitt. Stat. 372, n. See also the notes to *Peter v. Compton*, 1 Smith’s Leading Cases, 143.

*815] *pointing to contracts the complete performance of which is of necessity extended beyond the space of a year. That appears clearly from the case of *Boydell v. Drummond*, the rule to be extracted from which is, that, where the agreement distinctly shows, upon the face of it, that the parties contemplated its performance to extend over a greater space of time than one year, the case is within the statute; but that, where the contract is such that the whole *may* be performed within a year, and there is no express stipulation to the contrary, the statute does not apply. Looking at the terms of the agreement here, I see nothing to show that its performance was necessarily to extend beyond a year. A contract to serve another for two years, would be within the statute; but a contract to serve for an indefinite period, subject to be put an end to at any time upon a reasonable notice, is not within the statute, though it may extend beyond the year. Here, there was no certain time stipulated for the duration of the contract. It seems to me, therefore, that, supposing the statute of frauds to apply to executed contracts, the evidence excludes the present case from its operation.

COLTMAN, J. I also think this case is not within the fourth section of the statute of frauds. The contract was, that the child should be maintained by the plaintiff at a charge of one guinea per month, subject to be put an end to at any time at the option of the defendant. That brings the case exactly within *Peter v. Compton*. There, the defendant contracted, in consideration of one guinea, to give the plaintiff a certain sum of money at his day of marriage: the marriage did not happen until more than a year had expired; but the court was of opinion, that, as the contract was subject to a contingency that might happen within a year, and there was no express agreement extending the performance beyond the year, a note in writing was not necessary. So, here, *816] there was an express contingency that might defeat the contract within a year, namely, the determination of the *defendant's* will. If it had been necessary to decide this case upon the other point, I should have wished to consider it; because, I feel some difficulty in saying that the plaintiff may rely on an executed consideration, where he is obliged to resort to the executory contract in order to make out his case. The case not being within the statute, however, we need not embarrass ourselves with the discussion of that point.

CRESSWELL, J. I also am of opinion that this rule should be made absolute. Upon the evidence reported to us, it is quite clear that this was not a contract within the fourth section of the statute of frauds, inasmuch as there was no stipulation or understanding that it was not to be performed within a year. In reality it was a contract at so much per month, determinable at any time at the defendant's pleasure.

ERLE, J. I also am of opinion that the rule should be absolute to enter a verdict for the plaintiff for 15*l*. The *treaty* certainly did contemplate the endurance of the contract for the child's maintenance beyond a year.

but the ultimate *contract* was that the plaintiff should receive a guinea per month, and that the period should be, so long as the defendant should think proper. According to the case of *Peter v. Compton*, that is a contingency that prevents the application of the statute. Upon reconsideration, therefore, I am of opinion that I ought to have directed the jury to find for the plaintiff.

Rule absolute.

*BENTLEY v. CARVER and Others. *April 22.* [*817

The costs occasioned by a cause being a remanet, are costs in the cause, not taxable, as costs of the trial, on a rule for a new trial on payment of costs.

THIS was an action for an infringement of a patent. The cause was entered for trial as a special jury cause, at the sittings in Middlesex, after Trinity term, 1844, but in consequence of the number of causes entered, it was made a remanet. At the trial at the sittings after Michaelmas term, the jury returned a verdict for the plaintiff. In the following Hilary term, the defendants obtained a rule nisi for a new trial, which in Easter term was made absolute on payment of costs. The master having, on taxation, allowed, as part of the costs of the trial, the costs occasioned by the cause being made a remanet.

Sir T. Wilde, Serjt., in the last term, obtained a rule nisi to review the taxation. He submitted that the costs occasioned by a cause being made a remanet, were properly costs in the cause, and payable by the party who should ultimately prove unsuccessful, and not costs of the day. He cited *Hullock on Costs*, p. 432; *Sadler v. Evans*, 4 Burr. 1987, *Burchell v. Ballamy*, 5 Burr. 2693; *Gibbins v. Phillips*, 8 B. & C. 437; *Waters v. Weatherby*, 3 Dowl. P. C. 328; *Lord v. Wardle*, 6 Dowl. P. C. 176, 5 Scott, 398; *Pugh v. Kerr*, 8 Dowl. P. C. 218; and *Brett v. Stone*, 1 D. & L. 140. He also adverted to the case of *Robinson v. Day*, 5 B. & Ad. 814, 2 N. & M. 670, as being the authority upon which the master had acted.

*Channell, Serjt., on a former day in this term, showed cause. [*818 This is a town cause. In *Robinson v. Day* this question was fully considered, and decided after time taken to inquire as to the practice of the other courts; and the conclusion come to by the court after such reference to the masters (as appears from the report in 2 Nev. & M.) was, that, where a party obtains a rule for a new trial upon payment of costs, remanet fees are to be included in those costs. From the report in 5 B. & Ad., it appears that the court took a distinction in this respect between town and country causes. [CRESSWELL, J. The reason for that distinction may be this: in town causes, the cause, though made a remanet, keeps its place at the head of the paper; whereas, in country

causes, it must be re-entered, and has no priority unless the judge makes a special order.] In town causes, it is not the practice to give a new notice of trial; in country causes it is. There has been no subsequent decision controverting the case of *Robinson v. Day*.

Sir T. Wilde, Serjt., in support of the rule. Costs of the day and costs of a trial stand pretty much upon the same footing. In town causes, where the plaintiff has to pay the costs of the day for not proceeding to trial, he clearly is not liable for the costs incurred in consequence of the cause having been made a remanet from a former sitting: *Waters v. Weatherby*, *Brett v. Stone*. In *Waters v. Weatherby*, PATTESON, J., says: "Suppose the cause had been made a remanet from one assize to another, in consequence of the court not being able to try all the causes entered, there is no reason for saying that the plaintiff would have been liable to the defendant's costs at the first assizes. The reason is, that the delay is not the delay of the plaintiff, but the delay of the court." Formerly, neither party had the costs *occasioned by the cause being made a remanet,^(a) because neither party was in fault. In *Sadler v. Evans*, 4 Burr. 1987, where the question arose, Lord MANSFIELD seemed at first to think, that, if neither side were in fault, neither side should pay costs. But, "the court and Master Owen agreed to the general rule that costs are to be paid, where the cause goes off upon a remanet, as well as any other costs in the cause; and instanced some Maidstone causes, which went off for want of viewers, so that neither party was in fault." In the margin of that book the reporter cites a case of *Standen d. Wheatley v. Hall*, 29 G. 2, B. R., where, "upon a remanet without any default whatsoever in either party, it was argued, that, where neither party was in fault, neither ought to be punished in costs: but the court thought it depended upon the practice; and Master Clarke certifying that it was his practice to allow them the rule to show cause why he should not review his taxation, was discharged; and FOSTER, J., said it was the right method;" and also a case of *Price d. Cuthbert v. Birt*, 16 G. 2, B. R., where the cause went off *pro defectu juratorum*, and the whole court agreed "that these costs ought to be allowed as part of the costs of the suit." And the reporter adds the following note:—"On the crown side, it is the practice to allow them. In C. B. the prothonotaries did not use to allow them; but on the 7th July, 1767, I was informed that the court of C. B. had determined to come into the practice of this court for the future." And the practice is recognised in *Burchell v. Ballamy*. In *Gibbins v. Phillips*, after a verdict for the defendant, the court made a rule absolute for a new trial, and ordered that the costs of the former trial should abide the event of such new trial. The record was carried *820] down to the spring *assizes following, when it was made a remanet. It was tried a second time at the summer assizes, when a verdict was again found for the defendant. The court afterwards or-

(a) *Hullock*, 432.

dered that that verdict should be set aside, and a new trial had between the parties, upon payment of the costs of the last trial, and that the costs of the former trial should abide the event of such new trial. Upon the third trial, a verdict was found for the plaintiff. It was held that the plaintiff was entitled to the costs occasioned by the cause having been made a remanet at the assizes next following the term when the first rule was made absolute for a new trial. Lord TENTERDEN there said: "The general rule is, that the party who succeeds *ultimately* is entitled to the costs occasioned by the cause having been made a remanet. Here, the plaintiff having ultimately succeeded, I think, that, as the rule made by the court after the second trial did not provide in express terms for the costs of the remanet, they ought to be considered as costs in the cause, and that they were properly allowed as such by the master." *Robinson v. Day* was decided without any notice being taken of any of the authorities; and, upon inquiry in the other courts, it has been ascertained that the masters do not act upon the rule there laid down.

Channell, Serjt. It must be borne in mind that *Gibbins v. Phillips* was prior in point of date to *Robinson v. Day*, and also that it was a country cause.

TINDAL, C. J. If this were *res nova*, I should be inclined to say that the old practice of this court ought to prevail. We will, however, confer with the other judges before disposing of this rule.

Cur. adv. vult.

*TINDAL, C. J., now said:—We have seen some of the judges of the other courts; and they agree with us in thinking that the case of *Robinson v. Day* must have been decided upon some misapprehension, and that the costs properly allowed upon a rule for a new trial are, the costs of the day, and not such costs as are usually understood to be costs of the cause. The costs in question are not to be allowed until the termination of the suit. Rule absolute to review the taxation. [821]

GORDON and Others v. ELLIS and Another. April 22.

To assumpsit by A., B. and C. against D. for money had and received, D. pleaded, that, before the money had been received, &c., the plaintiffs carried on the trade of founders in partnership; that, while they were such partners, A., with the privity and concurrence of B. and C., employed D., an auctioneer, to sell certain property belonging to the firm; that, at the time A. so employed D. to sell the said property, and at the time of the sale thereof, and at the time when the debt after mentioned became due from A. to D., D. believed that A. was the sole and exclusive owner of the property, and had full power and authority to sell the same, and to receive the proceeds for his own sole use, D. having no notice or knowledge that B. and C. had any right or interest in the property; that, after A. had so employed D., and before D. had any notice that A. was not sole and exclusive owner of the property, or of the proceeds thereof, A. became indebted to D. in a sum exceeding the moneys in the declaration mentioned, out of which D. was ready and willing to set off and allow the sums in the declaration mentioned.

The plaintiffs replied, that, at the time of selling the property, D. had knowledge that A. was not the sole and exclusive owner of the property.

Held, on demurrer to the replication, that the plea was bad, inasmuch as it did not allege that A. appeared as sole owner of the property, with the assent or by the default of his partners; and therefore that it was a mere attempt to set off a debt due from one partner against a debt due to the firm.

ASSUMPSIT, for money received by the defendants for the use of the plaintiffs, and for money found due upon an account stated.

Third plea—except as to 160*l.*, parcel of the sums in the declaration mentioned—that, before the money in the declaration mentioned had been had or received by the defendants, and also before the stating of the
 *822] *accounts in the declaration mentioned, or either of them, to wit, on the 1st of July, 1842, the plaintiffs carried on the trade of founders, in partnership together as co-partners; and thereupon, while they, the plaintiffs, continued to be, and were such partners as aforesaid, to wit, on the day and year aforesaid, the plaintiff, M. F. Gordon, with the privity and concurrence of the other plaintiffs, applied to and requested the defendants, who then carried on, and still continued to carry on, in partnership together, the business of auctioneers and appraisers, and also then retained and employed the defendants, as such auctioneers, to put up to sale and dispose of certain property of and belonging to the plaintiffs as such co-partners as aforesaid, which the defendants then agreed to do: that, at the time when Gordon applied to and requested them to sell and dispose of the said property, and also at the time of their selling and disposing thereof, and at the times when the debts and moneys thereafter mentioned to have been due from Gordon to the defendants became and were due and were incurred as thereafter mentioned, they, the defendants, believed that Gordon was the sole and exclusive owner of the said property, and had full power and lawful and absolute authority to sell and dispose of the same, and to receive the proceeds thereof as and for his own property, and for his own sole use, benefit, and advantage; they the defendants then having, and they in fact said that they then had, no notice or knowledge whatsoever that the said other plaintiffs, or any other person whatever, had any right, title, estate or interest whatever in the said property, or any part thereof: that the defendants, afterwards, to wit, on, &c., aforesaid, sold and disposed of the said property for certain sums of money, being the same identical moneys in the declaration above mentioned, and for which the action was brought; that, after Gordon had so re-
 *823] tained *and employed the defendants as aforesaid, and before the defendants, or either of them, had any notice that Gordon was not the sole and exclusive owner of the said property, or of the proceeds thereof, or any part thereof, and before and at the commencement of the action, to wit, on, &c., aforesaid, Gordon became and was, and ever since had been, and still was, indebted to the defendants in a large sum of money, to wit, 5000*l.*, for work and labour of the defendants before then done and performed by the defendants for Gordon, at his request, and for money

lent by the defendants to Gordon, at his like request, and for money paid by the defendants for the use of Gordon, at his like request, and for money found to be due to the defendants from Gordon on an account then stated between them; which sum of money, so due to the defendants from Gordon as aforesaid, exceeded the moneys in the declaration mentioned, except as aforesaid; and out of which sum the defendants were ready and willing, and thereby offered, to set off and allow the full amount of the moneys in the declaration mentioned, except as aforesaid—verification.

Replication—that, at the time of the selling and disposing of the property in the third plea mentioned, as therein alleged, the defendants had knowledge that Gordon was not the sole and exclusive owner of the said property, in manner and form as in the third plea alleged; concluding to the country.

To this replication the defendants demurred generally.(a)

*The plaintiffs joined in demurrer.(b)

Byles, Serjt., (with whom was *Willes*,) in support of the demurrer.

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It will not be contended that, under ordinary circumstances, there can be a set-off of a debt due *from* one member of a firm against a debt due *to* the firm: but the present case forms an exception to the general rule. The decision of the court upon the motion to arrest the judgment in this case (c) leaves the present question untouched. Taking the plea and the replication together, there are four periods of time referred *to—

[*825

(a) In the *margin* of the demurrer-book was the following note:—"One of the grounds of demurrer is, that the replication contains no answer to the plea; for, that the defendants are entitled to set off against the plaintiffs' demand the debt due to them from Gordon, provided they had no notice that he was not sole owner of the property mentioned in the plea, either at the time when they were retained to sell it, or at the time when their set-off against him accrued—all which the replication admits; and that the defendants' right of set-off could not be affected by their subsequently, before the actual sale of the property, discovering that Gordon was not the sole owner, which is all the replication alleges."

(b) The following points were marked for argument on the part of the plaintiffs:—

"Upon the argument of the demurrer to the plaintiffs' replication to the defendants' third plea, the plaintiffs will not only contend and insist that such replication is sufficient in law, but they will also contend and insist that the said third plea is not sufficient in law, upon the following, amongst other, grounds, that is to say:—

"That it is not in that plea stated that the defendants were retained, or that it was their duty, or that they had any right to receive the sums of money for which the property in that plea mentioned was sold, as therein mentioned, and for which this action is brought:

"That it is consistent with that plea that the defendants received those sums without any right to receive them, and against the will of the plaintiffs:

"That it is not in the third plea stated, nor does it appear from or by that plea, that it was in consideration, in respect, or upon the faith of the defendants being employed as in that plea mentioned, or of their receiving, or being retained, allowed, or authorized to receive, the sums of money for which the property in that plea mentioned was sold, as therein mentioned, that the defendants allowed Gordon to become indebted to them as in the said third plea mentioned:

"That the third plea does not show that the defendants had or have any right or title to set off in this action the debt due to them from Gordon, as in the third plea mentioned:

"And that the said plea contains no good or sufficient answer or defence as to the causes of action as to which it is pleaded, or any part thereof."

(c) Vide 7 M. & G. 607, 8 Scott, N. R. 290, 2 D. & L. 308.

first, the employment of the defendants by Gordon to dispose of the goods—secondly, the advances made by the defendants to Gordon—thirdly, the knowledge by or notice to the defendants that Gordon was not the sole and exclusive owner of the goods—fourthly, the sale. [CRESSWELL, J. There is no allegation in the plea that any advances were made by the defendants to Gordon. ERLE, J. Nor is there any thing to show that the goods were not sold and the proceeds received before the debt from Gordon to the defendants accrued.] Gordon's partners are in the situation of undiscovered principals. They allowed him so to deal with the goods, that he appeared to the defendants to be the sole and exclusive owner of the goods. [TINDAL, C. J. The plea does not expressly allege that Gordon's partners allowed him to appear as the sole owner.] It appears that Gordon did deal with the goods as his own. [ERLE, J. Gordon employed the defendants to sell the goods, but, before the sale, Gordon and his two partners gave them notice not to sell. Could the defendants set off the separate debt of Gordon against the claim of the three to the damages recovered in an action of trover?] In *Sims v. Bond*, 5 B. & Ad. 389, 2 N. & M. 608, Lord DENMAN, C. J., says: "It is a well-established rule of law, that, where a contract, not under seal, is made with an agent, in his own name, for an undisclosed principal, either the agent or the principal may sue upon it; the defendant in the latter case being entitled to be placed in the same situation, at the time of the disclosure of the real principal, as if the agent had been the contracting party. This rule is most frequently acted upon in sales by factors, agents, or partners, in which cases either the nominal or real contractor may sue; but it may be equally applied to other cases." In *Stacey v. Decy*, 1 Esp. N. P. C. *826] 469, n., S. C. 7 T. R. 361, n., which was an action for goods sold and delivered, with a plea of set-off, it appeared in evidence that the plaintiffs had entered into a partnership as grocers, it being agreed that Ross should keep the shop in his own name only; and that, under these circumstances, he dealt with the defendant for the partnership goods, for which the action was brought. The defendant had done business for Ross on his own account, and not on account of the partnership, to a greater amount than the demand now made against him by the partnership; and this he offered to set off. It was opposed, on the ground of the demands accruing in different capacities, and that so it was inadmissible. But Lord KENYON was of opinion that the set-off was good; saying, "the plaintiffs had subjected themselves to it, by holding out false colours to the world, by permitting Ross to appear as the sole owner; that it was possible the defendant would not have trusted Ross only, if he had not considered the debt due to himself as a security against the counter-demand." Upon this EASKINE observed, "that the defendant had thereby a double advantage; for, if he dealt with Ross as the only partner, and had had a demand against the partnership account, he might have maintained an action against them all; yet here he was permitted to

consider Ross as the only partner." Lord KENYON admitted this consequence to follow from the fallacy held out to the world by such as stand in the situation of sleeping partners, but allowed the set-off to the extent claimed. That case is precisely in point. If there were any circumstances to render the defendants liable to the firm in this case, whether they had notice of the partnership or not, they should have been replied. The principle upon which the case of *George v. Clagett*, 7 T. R. 359, was decided, is clearly applicable here. It was there held, that, if a factor *sells goods as his own, and the buyer knows nothing of [827 any principal, the buyer may set off any demand he may have on the factor, against the demand for the goods made by the principal. That case proceeded upon the authority of a previous case of *Rabone v. Williams*, Middlesex Sitt. after M. T. 1785, 7 T. R. 360, n., 2 Smith's Leading Cases, p. 78, n., where Lord MANSFIELD, C. J., said: "Where a factor, dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him to all intents and purposes as the principal; and, though the real principal may appear, and bring an action upon that contract against the purchaser of the goods, yet that purchaser may set off any claim he may have against the factor, in answer to the demand of the principal. This has been long settled." This would formerly have been a defence under the general issue. But, in *Carr v. Hinchliff*, 4 B. & C. 547, 7 D. & R. 42, it was held to be properly the subject of a special plea. There, to assumpsit for goods sold and delivered, the defendant pleaded that the goods were sold and delivered to him by A., the factor and agent of the plaintiff, with the privity of the plaintiff, as and for the goods of A., and that the defendant did not know that the goods were not the property of A.; that, at the time of the sale and delivery, A. then, and still, was, indebted to the defendant in more than the value of the goods; and that the defendant was ready and willing to set off and allow to the plaintiff the value of the goods out of the moneys so due and owing from A.; and it was held, on special demurrer, that the plea was good,—on the ground that the permission given by the principal to the factor to sell the goods as he did, created an identity between them, so as to entitle the defendant *to set off the debt due to him from the [828 factor. BAYLEY, J., there says: "Two special causes of demurrer to the plea in question have been assigned—first, that it amounts to the general issue only—secondly, that the debts are not mutual, and therefore not within the statute of set-off. There is no doubt that the debts are not mutual, unless the factor may for this purpose be identified with the principal: but the cases of *George v. Clagett* and *Baring v. Corrie*, 2 B. & Ald. 137, show that they may be so identified: that objection, therefore, falls to the ground." The plea in this case substantially contains all the necessary allegations which are to be found in that plea. Gordon alone appeared to the defendants to be interested in the

goods. [CRESSWELL, J. Here the substance of the plea is, that Gordon, with the privity and concurrence of his partners, employed the defendants as auctioneers to sell certain goods; that the defendants believed that Gordon had authority to sell the goods and to receive the proceeds for his own sole use and benefit, they having no notice or knowledge to the contrary; and that, after Gordon had so employed the defendants to sell the goods, and before they had notice that he was not the sole owner, Gordon became indebted to them in a certain sum, which they seek to set off against a demand on behalf of the firm for the proceeds of the sale. It is not alleged that the defendants have done what they did on the faith and credit of Gordon being the sole owner of the goods.] Partners are bound by the acts of one another. [CRESSWELL, J. If done within the ordinary scope of their authority.] Suppose the plea had expressly alleged that Gordon, at the time he employed the defendants to sell the goods, represented himself to be the sole owner of them, would not the plea have *829] been good? [TINDAL, C. J. Clearly not, *without showing some default in the other partners, or some assent on their part.] It is submitted that their assent does sufficiently appear.

Channell, Serjt., (with whom was Bovill,) *contra*, was stopped by the court.

TINDAL, C. J. There is no allegation in this plea that Gordon, at the time he employed the defendants to sell the goods in question, appeared to them to be the sole owner, *with the assent of his partners*, or that there has been any laches or default on the part of the latter. If the other two had been mere sleeping partners, the defendants might have so alleged, in order to bring the case within that of *Stacey v. Decy*. This plea, however, merely seeks to set off a debt due to the defendants from Gordon alone, against a debt due from the defendants to a firm of which Gordon was a member. That cannot be allowed. I therefore think the plaintiff is entitled to judgment on this plea.(a)

The rest of the court concurred.

Judgment for the plaintiff.

(a) Byles, Serjt, afterwards made an unsuccessful application for leave to amend.

*830] *LOUISA WHITE, Administratrix, &c., of JAMES WHITE, deceased, v. HANCOCK. April 22.

Held, that an action of debt lies at the suit of A. against C. on a bond by which C. acknowledges himself to be bound to A. in 100*l.* to be paid to A. or B.

Held, also, that A. may declare upon such a bond without noticing B., although the alternative mode of payment appears by the bond being set out upon *oyer*, and although the declaration negatives payment to A., but is silent as to non-payment to B.

DEBT, by the plaintiff, as administratrix, with the will annexed, of James White, deceased, *durante minore etate* of John White, an infant

executor, upon a bond, bearing date the 30th of March, 1841, in the penal sum of 100*l.*, to be paid to the said James White or his certain attorney, executors, administrators, or assigns: breach, that the defendant, although often requested so to do, had not paid the said sum of 100*l.*, or any part thereof, but to pay the same had wholly refused, and still did refuse; to the damage of the plaintiff, as administratrix as aforesaid, of 10*l.*, &c.

The defendant cravedoyer of the bond and condition, by the former of which it appeared that one Blaylock and the defendant, as sureties for John Beischlag, "clerk of the Commercial Loan Company, established at No. 18, Queen Street, Seven Dials," acknowledged themselves to be severally bound to the testator, treasurer of the said company, in the sum of 100*l.* each, "to be paid to the said James White, or his certain attorney, executors, administrators, or assigns, or the treasurer of the said company for the time being;" and, by the latter, that the bond was to be void, "if the said John Beischlag did justly and faithfully execute his office of clerk of the said company, established as aforesaid, according to the rules and regulations of the said company for the time being, and should and did assign, and transfer or deliver, all and every sum and sums of money, securities and effects, books, papers, or property of or belonging to the said company, in his hands or custody, within three days after notice to that effect had been given to the *said John [831 Beischlag, to such person or persons as the said company should appoint, according to the rules of the said company, together with the proper legal receipts or vouchers." The defendant then demurred specially to the declaration, assigning for causes—that, as the said sum of 100*l.* in the writing obligatory mentioned was thereby made payable to the testator or the treasurer for the time being of the said company, an action of debt was not maintainable upon or for the breach of the said writing obligatory—that the declaration should have alleged that the defendant did not pay the said sum of 100*l.* either to the testator, or to the plaintiff, or to the treasurer for the time being of the company—that the declaration did not set forth the legal effect of the writing obligatory—that the declaration alleged, not only that the defendant owed to the plaintiff the said sum of 100*l.*, but also that he detained it from her—and that the declaration should have been in the detinet only, and not in the debet and detinet, &c.(a)

The plaintiff joined in demurrer.(b)

(a) The points marked for argument on the part of the defendant, were—"That debt *will*, not lie on the bond set forth in the pleadings, inasmuch as the penalty mentioned in the bond is payable to the obligee or the treasurer for the time being of the company therein mentioned, and not to the obligee alone; that an action of debt cannot be maintained upon an obligation to pay money to A. or B.; that it should have been alleged in the declaration that the defendant did not pay the said penalty either to James White or the plaintiff, or to the treasurer of the said company; that the declaration does not set forth the legal effect of the bond; and, generally, that *debt* in this case is the wrong form of action."

(b) The points marked for argument on the part of the plaintiff, were—"That an action

*832] *Byles, Serjt., (with whom was *Unthank*,) in support of the demurrer. Debt will not lie unless there is a simple duty to pay the money to some one person. It will not lie on a covenant that is conditional: 7 Vin. Abr. *Debt* (D), pl. 3. (a) In *Harrison v. Matthews*, 10 M. & W. 768, a declaration in debt stated, that, by an indenture made between J. H. of the first part, G. M. (the defendant) of the second part, W. A. the elder of the third part, W. A. the younger of the fourth part, and the plaintiff of the fifth part, the defendant covenanted with the plaintiff, that the defendant, the said J. H., W. A., and G. M., their heirs, executors, and administrators, or some or one of them, should or would pay or cause to be paid unto the plaintiff, his executors, &c., 300*l.*: and it was held that this was a collateral covenant, and that the action for the recovery of the money ought to be in *covenant*, and not in *debt*. PARKE, B., in delivering the judgment of the court, said: "It is well settled, that, if there be a covenant by the defendant that he will certainly pay a sum certain, debt will lie; and that it will, although the same sum is by the same deed secured by a mortgage: *Evans v. Jones*, 5 M. & W. 295. On the other hand, if he covenant that another shall pay a certain sum, and, if not, that the defendant will, debt will not lie. (b) And, on the same principle, it will not lie (after assignment assented to by the lessor) on the lessee's covenant that his assigns shall pay rent, the proper remedy being an action of covenant. Again, it is said in *Wentworth's Office of Executors*, *833] p. 123: "So, perhaps, if the covenant *be in the disjunctive, as, to do such an act, or to pay 10*l.*, debt will not lie, though the act be not done, but covenant only. If the law is correctly laid down in these authorities, as we think it is, they appear to us to warrant a judgment for the defendant. This seems to us to be the same as if the defendant had covenanted that he, or that J. S. or he, should pay, and to be governed by the principle of the authority above mentioned. It is in substance and effect the same as a covenant to pay if J. S. did not, and therefore an action of debt will not lie on it." [CRESSWELL, J. There is nothing conditional here; the money is to be paid at all events.] It is contingent as to the person to whom the payment is to be made—"to the said James White, or his certain attorney, executors, administrators, or assigns, or the treasurer of the said company for the time being." [TRINDAL, C. J. The same objection might be made to every bond.](c) The

of debt will lie at the suit of the plaintiff as administratrix of James White, the obligee named in the bond, the sum named in the bond being in law payable absolutely to the said James White; that the obligatory part of the bond admits a debt due to the said James White, and that the *solvendum* part thereof, making such debt payable to James White, or the treasurer, is inconsistent with the former part, and must be rejected; that the action of debt is the only action maintainable on a bond; that the breach is not a material part of the declaration; and that the *queritur*, in which the allegation of the *debet* is, is no part of the declaration, and may be rejected as surplusage."

(a) "So if the covenant is conditional, as thus, viz., that if C. do not pay to B. 10*l.* then A. will pay it. *Wentw. Off. Exec.* 123."

(b) Citing *Wentw. Off. Exec.* 123, 7 Vin. Abr. *Debt* (D).

(c) Vide *supra*, note (a).

declaration does not set forth the legal effect of the bond : it omits the *pec- cant* part of it. [TINDAL, C. J. The case of *Roberts v. Harnage*, 6 Mod. 228, 2 Salk. 659,(a) puts your argument at a discount. The plaintiff declared that the defendant became bound to him at Fort St. David's, in the East Indies, at London, in a bond of — for the payment of —, to him, his attorney, or assigns. Upon oyer, the bond appeared to bear date at Fort St. David's, in the East Indies : and the *solvendum* was, to the plaintiff's attorney, or assigns, without mention of himself.(b) An exception was taken, that the bond declared on and that set out on the oyer were variant—the one being *solvendum* "to him, his attorney, or assigns," the other, "to his attorney or assigns." The court said : "If A. make *a bond to B., *solvendum* to such person as he shall ap- [*834 point, if B. do appoint one, payment to him is a payment to B. ; and if B. appoint none, it shall be paid to B. himself."]

Channell, Serjt., contrà, referred to the case of *Hardman, executor of Agnes Hardman, v. John Hardman*, Cro. Eliz. 886 :—"Debt, upon a bill obligatory, for that the defendant *cognovit se debere, et promisisset solvere eidem Agneti* 10*l.*, at any time after the feast of St. Bartholomew which should be *in anno 1600, quandocunque* the said A. should require it, if the said Agnes *adtunc esset superstes*, and that the defendant, *licet sæpius requisitus* by the said Agnes after the said feast, viz., such a day, &c., had not paid it. The defendant demanded oyer of the bill, which was—Memorandum, that I, John Hardman the younger, do acknowledge myself to owe, and do promise to pay, to my mother Agnes Hardman the sum of 10*l.* at any time after the feast of St. Bartholomew whensoever she shall require the same, if my said mother shall then be in life ; for the payment whereof, I bind myself, my heirs, executors, and administrators, to John Hardman the elder, my father, by these presents, &c.' And it was thereupon demurred ; and adjudged for the plaintiff ; and that it was a good bill to Agnes, by the words in the first part of the bill ; and the words which oblige him to John Hardman, sen., in the last part of the bill, are void."(c)
Per curiam. Judgment for the plaintiff.

(a) And see Dyer, 350 a, Case 20.

(b) There the obligee had declared according to the legal effect of the instrument. So a bill of exchange or a promissory note, expressed to be payable to the order of A., may be described in pleading as a bill or note payable to A. himself.

(c) The last clause was rejected because repugnant to the complete obligation already contracted. In the principal case the court seems to have considered the words by which payment is directed to be made in the alternative, as void for repugnancy ; since otherwise the declaration would have been bad after the alternative had appeared upon oyer, for not showing non-payment to any trestler.

*S35]

*GIRAUD v. RICHMOND. April 23.

A. enters the service of B. under a written agreement, as follows:—"I agree to receive you as clerk in my establishment, in consideration of your paying me a premium of 300*l.*, and to pay you a salary at the following rates, viz., for the first year, 70*l.*; for the second, 90*l.*; for the third, 110*l.*; for the fourth, 130*l.*; and 150*l.* for the fifth and following years that you may remain in my employment;"

Held, that the agreement was one that by the statute of frauds was required to be in writing, that, there being a precise stipulation for yearly payments, evidence was not admissible to show that at or after the time the letter containing it was sent by B. to A., it was verbally agreed that the salary should be paid quarterly; and that the fact of the payments having usually been made quarterly, did not vary the rights of the parties under the agreement.

ASSUMPSIT for wages and salary due to the plaintiff as clerk to the defendant. Plea, non assumpsit.

At the trial before COLTMAN, J., at the sittings in Middlesex after Michaelmas term last, it appeared that the plaintiff entered into the service of the defendant as clerk or book-keeper, under a memorandum of agreement bearing date the 2d of May, 1842, signed by the defendant, and addressed to the plaintiff, of which the following is a copy:—

"I agree to receive you as clerk or book-keeper in my establishment, in consideration of your paying me a premium of 300*l.*, and to pay you a salary at the following rates, viz., for the first year, 70*l.*; for the second, 90*l.*; for the third, 110*l.*; for the fourth, 130*l.*; and 150*l.* for the fifth and following years that you may remain in my employment; and I also agree, in case of the death of either of us, to return 150*l.*."

The action was brought to recover half a year's salary at the rate of 130*l.* per annum.

On the part of the plaintiff, it was proposed, upon the authority of *Ridgway v. The Hungerford Market Company*, 3 Ad. & E. 171, 4 N. & M. 797, to call a witness to prove, that, at or about the time the agreement was entered into, it was verbally *arranged between the plaintiff and defendant that the salary should be paid quarterly, and that, in consequence, the payments had in fact usually been quarterly payments.

On the part of the defendant, it was insisted, that, under this agreement, the salary was payable yearly, and not otherwise, and consequently that this action was not maintainable.

The learned judge thereupon nonsuited the plaintiff, reserving to him leave to move to enter a verdict for 46*l.*, the amount of half a year's salary, after allowing for certain payments made by the defendant on the plaintiff's account, if the court should be of opinion that parol evidence, or the acts of the defendant, were admissible to explain the written contract.

Talfourd, Serjt., in Hilary term last, obtained a rule nisi accordingly. He cited *Thomas v. Williams*, 1 Ad. & E. 685, 3 N. & M. 545, and *Ridgway v. The Hungerford Market Company*.

Byles, Serjt., now showed cause. Parol evidence of what took place before, or at the time, or after the execution of the written contract, was altogether inadmissible for the purpose of varying its express terms. Where the agreement is to pay so much a year, whether it be for rent or for services, nothing becomes due until the end of the year. In Bacon's Abridgment, *Rent*, (F.) it is said: "A lease reserving rent *pro quolibet anno*, is all one as if it had been made payable annually, and then it is paid *at the end* of every year. (a) A rent, generally reserved, is payable at the end of the year; (b) but, if rent be reserved *annuatim durante termino prædicto*, the first payment to begin two years *after, this controls the words of reservation. (c) So, if a rent is made payable yearly during the [837 time the lessee shall enjoy the land, the lessor cannot demand this rent half-yearly, but must wait to the end of the year. (d) So, in *Spain v. Arnott*, 2 Stark. N. P. C. 256," Lord ELLENBOROUGH says: "If the contract be for a year's service, the year must be completed, before the servant is entitled to be paid." In *Turner v. Robinson*, 5 B. & Ad. 789, 2 N. & M. 829, which was an action for services, the contract proved was, that the plaintiff was to have wages *at the rate of 80l. per annum*. Before the expiration of a year, he was dismissed for misconduct. PARKE, B., said: "The *prima facie* presumption was, that the plaintiff was hired for a year: and there was nothing to rebut that presumption: and, having violated his duty before the year expired, so as to prevent the defendants from having his services for the whole year, he cannot recover wages *pro rata*." In *Thomas v. Williams*, the contract was dissolved by mutual consent within the year. This clearly was a contract that was required by the statute of frauds to be in writing: *Snelling v. Lord Huntingfield*, 1 C., M. & R. 20, 4 Tyrwh. 606. It was subject to no contingency, such as was held in the recent case of *Souch v. Strawbridge*, *antè*, p. 808, sufficient to take the case out of the statute. Parol evidence clearly was not admissible to control or vary the terms of the written contract: *Goss v. Lord Nugent*, 5 B. & Ad. 58, 2 N. & M. 28; *Marshall v. Lynn*, 6 M. & W. 109. In the latter case, PARKE, B., says: "Here, there was an original contract in writing to send these goods by the first vessel; an alteration as to the time of their delivery was subsequently made by parol; and the point to be decided is, *whether such an alteration, [838 by parol, of the written contract, can be binding. It appears to me that it cannot; and that the same rule must prevail as to the construction of the seventeenth section of the statute of frauds, which has already prevailed as to the construction of the fourth section. The decision in *Goss v. Lord Nugent*, the principle of which I have no doubt is perfectly correct, has clearly established,—with respect to the case of a contract relating to the sale of an interest in lands,—that, if the written contract be varied, and a new contract, as to any of its terms, substituted in the

(a) Citing 1 Lutw. 231
(c) Citing 3 Bulstr. 329.

(b) Citing Latch, 264.
(d) Citing Litt. Rep. 61; Hotley, 53.

place of it, that new contract cannot be enforced in law, unless it also be in writing. The question is, whether the same reasoning does not apply to a contract for the sale of goods, under the seventeenth section. It appears to me that no distinction can be made." Neither can the contract be varied by the subsequent acts, or course of dealing, of the parties. And the same rule obtains whether the contract is under seal or not: *Clifton v. Walmesley*, 5 T. R. 564. It was there held that the lessee of a coal-mine, who covenants to pay a certain share of all such sums of money as the coal shall sell for at the pit's mouth, is not liable, under that covenant, to pay to the lessor any part of the money produced by sale of the coals elsewhere than at the pit's mouth; and that evidence of the lessee's having accounted with the lessor, and paid him the share of money produced by the sale of coal elsewhere, was not admissible to explain the intention of the parties. GROSE, J., there said: "The court cannot declare that the coal was sold at the pit's mouth, which is expressly stated to be sold elsewhere. Whatever the meaning of the parties might have been, we can only look for it in the covenant; and in that they have *839] expressed themselves precisely and unambiguously; *and therefore we cannot receive extraneous evidence in explanation of it."

This question did not distinctly present itself for decision in *Ridgway v. The Hungerford Market Company*: the rule for a nonsuit was made absolute, on the ground that the plaintiff was properly dismissed from the service of the company.

Talfourd, Serjt., (with whom was *G. Atkinson*,) in support of the rule. There is nothing in the language of the contract that necessarily leads to the inference that the plaintiff was to receive the stipulated salary only once a year. [CRESSWELL, J. Taking the agreement *per se*, when had the plaintiff a right to demand salary? Could he claim to be paid at the end of each day or week?] The argument certainly must go that length; otherwise, nothing would become due until the end of the five years. If the times of payment be left uncertain, it is clearly competent to the parties to make a collateral agreement by parol to ascertain them. [COLTMAN, J. Then the difficulty arising from the statute of frauds presents itself; there is a material part of the contract that is not evidenced by writing.] The case of *Ridgway v. The Hungerford Market Company* is strictly analogous. It was there held, that, after a general hiring at a yearly salary, payment and acceptance of the salary by quarterly payments is evidence of a subsequent contract to pay and receive quarterly. The plaintiff there was hired by the company as clerk "at a salary of 200*l.* a year," by a resolution of the directors present at a meeting, which resolution was entered in the minute-book. The resolution was silent as to the time at which the salary was to be paid; but proof was given that it had always been paid quarterly. Lord DENMAN, upon a motion for a nonsuit on the ground, amongst others, that there was a variance between

the proof and the contract laid in the declaration, said: "It *was consistent with the minute of the appointment of the plaintiff as clerk to the company at an *annual* salary, that he might have subsequently insisted on *quarterly* payments, and that the directors might have agreed to that mode of payment." And PATTESON, J., said: "Taking the whole of the evidence, it is clear there was a contract with the plaintiff for a salary of 200*l.* a year, *payable quarterly.*" It is true there was no absolute *decision* upon the point in this case; but the inclination of the court was very distinctly expressed. Here, the parol evidence was not offered for the purpose of adding to, or varying, the terms of the written contract. The cases as to rent can have no application to a contract for personal services. [CRESSWELL, J. If the time of payment be a material part of the contract, then, inasmuch as the contract was one that was required by the statute of frauds to be in writing, and the whole agreement is not in writing, the plaintiff cannot sue upon it.] If there is no binding contract, the plaintiff is entitled to recover upon a *quantum meruit*.

TINDAL, C. J. This appears to me to be a contract within the statute of frauds: it was not to be performed within a year. The services were rendered by the plaintiff under this contract, and no other. Looking at its terms, it appears to me that the salary thereby agreed to be paid, was payable at the end of every year, and not otherwise. This agreement must receive the same construction as would be put upon a lease reserving rent payable yearly. The question, therefore, is, whether we can supply an alleged defect in the contract by parol evidence of a contemporaneous or subsequent agreement for the payment of the salary quarterly. I think that would be a direct violation of the statute. The plaintiff then desires it to be inferred from the subsequent acts of the parties, that the agreement was for quarterly *payments. *Goss v. Lord Nugent* is a [*841 distinct authority to show that a written contract cannot be so varied. *Ridgway v. The Hungerford Market Company* was decided upon a totally different ground.

COLTMAN, J. It is clear that parol evidence was not admissible in this case to vary the terms of the written contract: and the subsequent acts of the parties stand upon the same footing. An agreement of this nature must be wholly in writing.

CRESSWELL, J. I am of the same opinion. This is a case in which the statute of frauds requires the contract to be in writing: and I think all the material parts of this contract were in writing: it contained quite enough to show what the parties respectively bound themselves to do. The defendant engaged to pay the plaintiff the stipulated amount of salary at the end of each year, and not at any intervening periods. And I am clearly of opinion that no parol evidence was admissible to vary the contract.

ERLE, J. I am of the same opinion, on the ground that the contract was one which, by the statute of frauds, is required to be in writing.

The defendant was bound to keep the plaintiff in his service for the space of five years at the least. If parol evidence was not admissible to explain, or vary, the terms of the written contract, the salary clearly was payable yearly. The plaintiff, however, insisted that he was at liberty to show a collateral parol agreement for quarterly payments; or, at all events, that he might rely upon the fact of the salary having always been paid quarterly. The terms of the agreement being free from ambiguity, I think it was not competent to the plaintiff to give such evidence. The distinction *842] between the present case and *Ridgway v. The Hungerford Market Company* appears to me to be this: the contract there was not necessarily one, the complete performance of which would extend beyond one year; and therefore it might perhaps be varied by subsequent acts or conversations.

Rule discharged.

DOE dem. PHILLIPS v. ROLLINGS. *April 25.*

A verdict having been taken for the plaintiff, subject to a case to be settled by a barrister, and the defendant having refused to procure the signature of a serjeant to the case when so settled, the court made a rule, that the record and postea should be delivered by the associate to the plaintiff, unless the defendant should, within a week, cause the case to be signed.

A VERDICT was taken for the plaintiff, subject to a special case, to be settled by a barrister, for the opinion of this court; the costs of the cause and of the reference to abide the event. The case having been accordingly settled by the referee, the defendant refused to procure the signature thereto of a serjeant on his behalf.

Channell, Serjt., now moved for a rule calling upon the defendant to show cause why the special case should not be set down for argument without such signature. He referred to *Mostyn v. Champneys*, 1 Scott, 57, where this court refused to allow an unsigned case from the Master of the Rolls to be set down for argument: but he submitted that this being somewhat in the nature of an award, did not fall precisely within the same consideration.

Sir *T. Wilde*, Serjt., *amicus curiæ*, suggested that the proper course would be, to direct the associate to deliver the postea to the lessor of the plaintiff, and allow him to sign judgment, unless the defendant, within a *843] given time, conformed to the order of nisi prius. He referred to *Jackson v. Hall*, 8 Taunt. 421.(a)

CRESSWELL, J. If that course be adopted, it may be doubtful whether the plaintiff can obtain the costs occasioned by the reference to the barrister to settle the case. The order gives him no power to determine the cause: the determination of the cause would depend upon our judgment on the case.

(a) Vide S. C. 2 J. B. Moore, 478. And see *Blanchenay v. Vandenberg*, 3 J. B. Moore, 643.

TINDAL, C. J. Let the rule go in the terms suggested by my brother *Wilde*. The costs of the reference may be made the subjects of a special direction to the master hereafter.

A rule was ultimately granted in the following terms:—to show cause “why the associate should not be at liberty to deliver to the lessor of the plaintiff, or his attorney, the record and postea in this cause, and that the lessor of the plaintiff be at liberty to sign and enter up final judgment thereon, unless the defendant shall, within a week, procure the signature of a serjeant on his behalf to the said special case.”(a)

(a) The case was duly signed within the time prescribed by the rule, and was argued: on the 15th of February, 1847, the court gave judgment for the plaintiff. *Vide post*, vol. iii.

*TOMLINSON, Clerk, v. Sir T. F. F. BOUGHEY, Bart., [*844
and Another. *April 25*.

Seem, that a defendant is *not* entitled to judgment as in case of a nonsuit where the plaintiff has allowed two assizes to elapse without proceeding to trial after issue joined on a feigned issue under the tithe-commutation act, 6 & 7 W. 4, c. 71, s. 46; but should move, for the costs of the action, under that section.

The discretion as to allowing costs in such a case is to be exercised in accordance with the general rule which gives costs to the successful party, unless there be special circumstances to justify a departure from such general rule.

Where, therefore, the plaintiff declined to proceed to trial, because a decision of the court had so narrowed the issue as to render it inexpedient for him to incur the expense of a trial:—*Held*, that the defendants were entitled to their costs.

On the 16th of August, 1844, the plaintiff commenced an action under the 46th section of the tithe-commutation act, 6 & 7 W. 4, c. 71, by way of appeal against the award of an assistant tithe-commissioner, dated the 20th of May, 1844. An appearance was entered on the part of the defendants on the 28th of August, and a feigned issue delivered, in which the venue was laid in the county of Stafford.

Talfourd, Serjt., for the defendants, in Michaelmas term last—upon an affidavit that two assizes had elapsed since the commencement of the action, that no application had been made to the court or a judge to extend the time for going to trial,(b) and that the plaintiff had *not proceeded to the trial of the cause—obtained a rule nisi for judgment as in case of a nonsuit. [*845

(b) The 46th section of the 6 & 7 W. 4, c. 71, enacts “that any person claiming to be interested in any lands, or in the tithes thereof, who shall be dissatisfied with any such decision of the commissioners or assistant commissioner, (under s. 45,) may, if the yearly value of the payment to be made or withholden according to such decision shall exceed the sum of 20l., cause an action to be brought in any of his majesty’s courts of law at Westminster, against the person in whose favour such decision shall have been made, within three calendar months next after such decision shall have been notified in writing, in such manner as the commissioners or assistant commissioner shall direct, to the parties interested therein, or to their known agents, in which action the plaintiff shall deliver a feigned issue, whereby such disputed right may be tried, and shall proceed to a trial at law of such issue at the sittings after the term, or at the assizes then next, or next but one, after such action shall have been commenced, to be

Channell, Serjt., in Hilary term last, showed cause. This application is not warranted by the statute. In *Wick v. Cotton*, 1 D. & L. 227, it was held by WIGHTMAN, J., that a feigned issue under this statute is not within the same rules of practice as actions at law; and therefore, when the plaintiff fails to proceed promptly to trial on such an issue, the defendant cannot obtain judgment as in case of a nonsuit, but must make the delay of the plaintiff the subject of a special application to the court. The defendants should have applied to the court for costs; as was done in *Barker v. Birch*, 6 M. & G. 307, 7 Scott, N. R. 397, (a) the statute having placed the costs in their discretion. (b) In *Sandys v. The Mayor, &c. of Beverley*, 12 M. & W. 568, the court of Exchequer is said to have held that a defendant is entitled to judgment as in case of a nonsuit, *846] where the plaintiff has allowed two assizes to elapse "without proceeding to trial after issue joined on a feigned issue joined under this act. But the language of the court would rather lead to the conclusion that the rule was not made absolute in that form: for, PARKE, B., says: "It is clear that two assizes have passed since the commencement of the action, so as to bring the case within the statute *as regards the costs*. We will, therefore, make an order to *that effect*, otherwise it will be supposed *that we have declined to allow any costs*." (c) And it is to be observed that the case of *Wick v. Cotton* was not adverted to.

Talfourd, Serjt., *contra*. The rule was moved in its present form, because it was thought there might be a difficulty in applying for costs until the issue had been finally disposed of.

MAULE, J. In the case of *Sandys v. The Mayor, &c. of Beverley*, the court of Exchequer seem to have thought that the statute 14 G. 2, c. 17, is repealed as to costs by this act.

The rule was enlarged by consent, upon an understanding that it should come on as if it were a rule for costs of the action; either party to be at liberty to file additional affidavits.

Channell, Serjt., now showed cause, upon an affidavit stating, amongst other things, that, "after the decision of this court against the plaintiff's right of appeal with regard to the questions raised by the issues as to the

hoken for the county within which such lands, or the greater part thereof, are situated, with liberty, nevertheless, for the court in which the same shall have been commenced, or any judge of his majesty's courts of law at Westminster, to extend the time for going to trial therein, or to direct the trial to be had in another county, if it shall seem fit to such court or judge so to do."

(a) And see *Croughton v. Blake*, 12 M. & W. 205.

(b) Section 48 provides, "that the costs of every such action, or of stating such case and obtaining a decision thereon, shall be in the discretion of the court in or by which the same shall be decided, which may order the same to be taxed by the proper officer of the court; and the like execution may be had for the same as if such costs had been obtained upon a judgment of record of the said court."

(c) Upon inspecting the book at the Exchequer Rule Office, the rule given out is found to have been the ordinary *printed* form of a rule absolute for judgment as in case of a nonsuit, with the addition of these words at the end—"And it is further ordered that the said plaintiff do pay to the said defendants their costs of the action, to be taxed by the master."

*hay moduses,(a) upon a careful consideration of the case in all its bearings, and particularly looking to the reduced nature of the appeal against the decision of the said assistant tithe-commissioner, and the comparative smallness of the value of the payment to be made, should the plaintiff succeed, and the amount of costs should he fail, the plaintiff, by the advice of his attorney, forbore to give notice of trial, and suffered the day to go by without giving such notice of trial, and thereby abandoned his intention of appealing against the said decision." The costs being, by the express provision of the act, in the discretion of the court, the only question is whether or not this is a case in which, regard being had to all its circumstances, costs ought to be imposed upon the rector. In *Barker v. Birch*, 6 M. & G. 306, 7 Scott, N. R. 397, and *Croughton v. Blake*, 12 M. & W. 205, the issues had been tried. When this case came before the court upon a rule calling on the defendant to accept the issue as originally framed,(a) though the court decided substantially against the rector, yet they did not think it a case for costs. That decision having induced him to forbear to proceed to trial, the case can hardly be looked upon as one that ought to be governed by the ordinary rule with regard to costs. [*847]

Talfourd, Serjt., in support of the rule. There is nothing in this case to take it out of the ordinary rule by which a judicial discretion ought to be regulated in a matter of this kind. The plaintiff in the issue has *declined to proceed to trial: what may be his motives for abstaining from proceeding, is nothing to the defendants. The plaintiff, or his attorney, does not now allege that he ever had any ground for proceeding at all. [TINDAL, C. J. What does the statute mean by giving the court a discretion?] Under the interpleader act, the costs are in the discretion of the court or judge; but the courts uniformly award costs to the successful party. There is no reason why one man should try his right at another's cost. In *Earl Fitzwilliam v. Maxwell*, 7 Taunt. 31, 2 Marsh. 355, it was held that the plaintiff was entitled to enter up judgment(b) on a feigned issue under an enclosure act, as in other actions of assumpsit, and that no special directions having been given as to costs, they were to abide the event, under the statute of Gloucester. *Barker v. Birch* is a distinct authority that the discretion given to the court under this act is to be exercised in accordance with the general rule which gives costs to the successful party, unless there be special circumstances to justify a departure from such general rule. That case is infinitely stronger than this. The defendant there had bought certain lands in [*848]

(a) Vide *anté*, vol. i. p. 663. The court there held, that, where, in proceedings before a tithe-commissioner under the 45th section of the 6 & 7 W. 4, c. 71, several moduses are set up in respect of distinct farms, and the annual value of the payment to be made in respect of each farm is less than 20*l.*, his decision is final, notwithstanding the whole is in the hands of the same proprietor, and the aggregate yearly value exceeds 20*l.*

And see *Matthews v. Leapingwell*, post, vol. iii.

(b) As to entering up judgment upon verdicts on feigned issues, see post, 858.

Norfolk, which, in the conditions of sale, were described as tithe-free, or subject to a modus, or customary payment, not exceeding 10s., in lieu of tithes: the plaintiff purchased the advowson of the same parish at the same sale. The defendant, in 1840, made a claim before an assistant tithe-commissioner, setting up a modus of 6s. 8d., which he failed to establish: he afterwards (pending an action under s. 46) preferred a second claim, setting up a modus of 6s.: the plaintiff thereupon made an application to the court of Exchequer for a prohibition to prevent the commissioner from proceeding to award on *this second claim: in *849] which application he was ultimately defeated. In the meantime, the assistant tithe-commissioner made an award (upon an *ex parte* hearing) affirming the modus of 6s.; whereupon the plaintiff brought an action by way of appeal. The defendant having obtained a verdict, the majority of the court held that there was nothing in the circumstances to prevent the application of the general rule as to costs.

TINDAL, C. J. I cannot help thinking that the general words of the forty-sixth section give to the court a wider discretion than the mere event of the suit. The act alters the whole constitution of the law of tithes, and puts the rights of the clergy upon an entirely new footing. Still, I think the party who seeks to be relieved from the payment of costs, is bound to show, affirmatively, circumstances to vary the case from the ordinary rule. Nothing has been suggested to satisfy us that the ordinary rule as to costs should not prevail in this case, and, therefore, I think the defendants are entitled to their costs.

COLTMAN, J. The plaintiff should have determined upon his course immediately after the decision of the court.

The rest of the court concurred.

Rule absolute "that the plaintiff do and shall pay to the defendants, or their attorney, their costs of this action, pursuant to the statute 6 & 7 W. 4, c. 71, to be taxed," &c.

*850] *WALKER v. REMMETT. April 27.

A written authority in the following terms, "I authorize you to endorse my name to three several bills of exchange now in your possession," (describing them,) was held to be a *letter or power of attorney*, requiring a 30s. stamp under 55 G. 3, c. 184.

So, although it goes on to say "and which endorsement I undertake shall be binding upon me; and I undertake to pay you the amount of the several bills as they respectively become due, should they not be duly honoured when mature."

ASSUMPSIT on a bill of exchange, by endorsee against acceptor. The declaration stated, that one Newman drew the bill upon the defendant, who accepted the same, and that Newman endorsed to one Harrison, Harrison to one Herbert, and Herbert to the plaintiff.

Plea, amongst others, that Harrison did not endorse the bill *modo et forma*; whereupon issue was joined.

At the trial, before COLTMAN, J., at the sittings in Middlesex after last Michaelmas term, it appeared that the bill had been endorsed by Herbert, in the name of Harrison, under the following authority signed by Harrison, and which at the time it was offered in evidence was stamped with a 2s. 6d. agreement stamp:—

“I do hereby authorize you to endorse, or cause to be endorsed, my name to three several bills of exchange now in your possession—Mr. Paten’s account, 35*l.* 16*s.* 9*d.*, Mr. Edwards’s do. 180*l.*, and Mr. Remmett’s do. 250*l.*—and which endorsements I do hereby undertake shall be binding upon me; and I do further undertake to pay you the amount of the several bills as they respectively become due, should they not be duly honoured when mature.”

On the part of the defendant, it was objected that this was a “letter, or power, of attorney,” within the general stamp act, 55 G. 3, c. 184, sched. Part I., or a “deed or other instrument of procuration,” and liable, in either case, to a duty of 1*l.* 10*s.*

The learned judge took a note of the objection, and received the document. The jury having returned a verdict for the plaintiff,

**Dowling*, Serjt., in Hilary term, obtained a rule nisi for a new trial, on the ground that this evidence was improperly received. [*851] He referred to the *Queen v. Kell*, 12 Ad. & E. 559, 4 P. & D. 185.

Byles, Serjt., (with whom was *F. V. Lee*,) now showed cause. The first part of the schedule to the act contains three descriptions of letters or powers of attorney upon which stamp-duty is imposed: “Letter or power of attorney made by any petty officer, seaman, marine, or soldier serving as a marine, or by the executors or administrators of any such person, for receiving prize money, 1*s.*” “And for receiving wages, 1*l.*.” “Letter of attorney for the sale, transfer, acceptance, or receipt of dividends of any of the government or parliamentary stocks or funds, 1*l.* 10*s.*.” “Letter or power of attorney of any other kind, or commission or *factory* in the nature thereof, 1*l.* 10*s.*” This latter provision seems to have reference to the Scottish law: see *Bell’s Principles of the Law of Scotland*, 4th edit. p. 80, § 219, *et seq.*; it supposes some formal kind of instrument. The document in question is not of that nature, or within the ordinary meaning of a letter of attorney: and the court will not strain the words of the act to bring a case within it. In *Warrington v. Furber*, 8 East, 242, Lord ELLENBOROUGH says: “I think that, where the subject is to be charged with a duty, the cases in which it is to attach ought to be fairly marked out; and we should give a liberal construction to words of exception, confining the operation of the duty.” And in *Tomkins v. Ashby*, 6 B. & C. 541, 9 D. & R. 543, Lord TENTERDEN, adopting the same view, says: “Acts of parliament imposing duties are so to be construed as not to make any instruments liable to them, unless [*852] manifestly within the intention of the legislature. This point

was expressly decided by Lord TENTERDEN, in *Case v. Barnard*, (a) where that very learned judge ruled that a paper authorizing A. to sell certain property, and thereout pay rent and expenses, and *his own commission*, signed by B., did not require any stamp. The question whether a proxy, a form of which was given by a local act, required a stamp, was discussed in the case of *The Monmouthshire Canal Company v. Kendall*, 4 B. & Ald. 453, (b) but ultimately it became unnecessary to decide it. In *The Queen v. Kelt*, 12 A. & E. 559, 4 P. & D. 185, by a local act, 41 G. 3, c. cxxxvi., commissioners for executing the act were to be nominated and appointed by the proprietors of lands to which the statute related; and persons authorized and empowered by note in writing, signed by proprietors, might act in the nomination and appointment on behalf of such proprietors. Certain proprietors signed a note in writing, stating that they did, "by this note in writing, under our hands, and in pursuance of the statute," &c., "authorize and empower" four parties named, "and any one of them, to act for us in the nomination and appointment of a special commissioner." The instrument contained no direction to vote for any particular person. It was held that it required a stamp, by the statute 55 G. 3, c. 184, sched. Part I., under one of the titles *Letter or Power of Attorney and Procurator*: and that, for want of the stamp, no valid vote could be given by any of the parties named in the instrument. Lord DENMAN, in delivering the judgment of the court, says: "The act empowers an agent, authorized by the proprietor by a note in writing, signed by him, to vote: the stamp-act *853] requires that all letters of attorney, and every deed or other instrument of procurator, should be stamped. This question was raised in the case of *The Monmouthshire Canal Company v. Kendall*, but was not determined; the court holding that the parties were not at liberty to dispute it under the circumstances. In the present case, the party is clearly entitled to take the objection. It was argued that no stamp was necessary, because the authority gave no direction to Mr. Barnaby (one of the parties named, by whom the vote in question was given) in voting; but this argument, supposing it to have any weight, is not founded in fact; for, on referring to the instrument, we find no restriction, nor does it state for whom Mr. Barnaby was to vote: it simply authorizes him to act for the persons signing it, in the nomination and appointment of a commissioner. He might have voted for any candidate he chose. As, therefore, Mr. Barnaby was, by the instrument in question, substituted for the proprietors signing, and appointed to act for them, we do not see how it is possible to deny that the writing by which he was so appointed is either a letter of attorney, or an instrument of procurator: and, however unwilling to yield to an objection of the sort, we feel ourselves bound to hold that the authority was bad, and the vote bad." That case is clearly distinguishable from the present: it was a formal instrument substituting

(a) Guildhall, 8th January, 1827. Chitty's Stamp Laws, 2d edit. p. 256 (k).

(b) Cited, Coventry on Stamps, 458.

one party for another. If this letter requires either a power of attorney, or a procuration stamp, every letter authorizing one man to act in any way for another, will be liable to be stamped with a 30s. stamp. This is, in truth, a mere agreement; the authority to endorse the bills being only ancillary to it. [TINDAL, C. J. The plaintiff is using it for the *power* contained in it, and not for the other purpose.] If the legislature had intended the charge to be so general, they would have added, "or written authority of any other kind," or words to that effect. Neither is this a "deed, or other instrument, of procuration," within the *act. [*854 "Procuration" is a term well known to the Scottish law. See Bell's Commercial Index, vol. ii. title "*Procuration*," Bell's Principles of the Law of Scotland, pp. 479—483; but it is unknown to the law of England, unless in the Ecclesiastical court. [TINDAL, C. J. The term "procuration" can hardly have been intended to be confined to Scotch law; for, that makes no distinction between deeds and other instruments in writing. CRESSWELL, J. Procuration is a well-known term: we often hear of *procuration* (a) money.]

Dowling, Serjt., (with whom was *Temple*,) in support of the rule. If the instrument in question was a mere agreement, the endorsement by Harrison was not proved; if a power of attorney, or an instrument of procuration, it required a 30s. stamp. The authority to endorse being in writing, it could only be proved by an instrument duly stamped. The words relied on as constituting the agreement, are mere surplusage; such an undertaking would be implied by law. It is difficult to conceive what would answer the description of a letter or power of attorney, if this instrument does not. The *nisi prius* decision of *Case v. Barnard* must be considered to have been overruled by the case of the *The Queen v. Kelk*, which is expressly in point. And the recent statute of 7 & 8 Vict. c. 21, s. 6, which imposes a duty of 2s. 6d. upon proxies, may be regarded as a legislative recognition of the propriety of the judgment which the court of Queen's Bench so reluctantly pronounced in that case.

TINDAL, C. J. It appears to me that the instrument offered in evidence in this case falls within the words of the 55 G. 3, c. 184, sched. part I., "Letter or power *of attorney of any other kind," which follow the mention of letters or powers of attorney of specific [*855 kinds; for, I cannot consider it in any other light than a delegation of authority or power in writing to perform an act. The definition of an attorney given in Com. Dig., *Attorney* (A), is as follows: "An attorney is he who is appointed to do any thing in the place of another: and he has a general authority, or a special one for some particular purpose; as, to make livery, to deliver a deed," &c. So in Co. Litt. 51 b, it is said that "attorney is an ancient English word, and signifieth one that is set in the

(a) There "procuration" seems to be used in the sense of "obtaining," not in the sense of "acting vicariously for another." The term is used in the latter sense, where instruments are said to be executed "by procuration."

turn, (a) stead, or place of another." And he may be appointed either by deed or by letter. (b) Here, the appointment is by letter. (c) It has been contended that this may be considered as an *agreement* only, because it contains an undertaking to pay the amount of the several bills endorsed under the authority or power, should they not be duly honoured. To that it has very properly been answered, that the letter contains no agreement to do any thing more than the law would imply from the endorsement itself. Again, Harrison's undertaking that the endorsements shall be binding upon him, imports no greater obligation than the law would have imposed upon him without it. Another answer to the argument, that this is an agreement only, is, that no consideration is expressed in it: all is *to be done on one side. (d) It seems to me that this *856] letter falls within the description of instruments already adverted to, and that a 30s. stamp was necessary.

COLTMAN, J. I am of the same opinion. This case is governed by the decision of the court of Queen's Bench in *The Queen v. Kelk*. It is true, that the court there rely on the fact of the attorneys having a discretion as to the parties they would vote for. I do not, however, accede to the doctrine, that, in order to a valid appointment of an attorney, he should have a discretion vested in him. The examples given by Chief Baron COMYNS, of an appointment of an attorney to make livery, or to deliver a deed, show that it is not of the essence of such an appointment that the attorney should have a discretion. Where one is authorized in writing, on behalf of another, and in his name, to do an act, that is an appointment of an attorney within the meaning of the stamp-act.

CRESSWELL, J. I am of the same opinion. I quite agree with my brother Byles as to the principles on which the stamp-acts are to be construed; and if I could have brought myself to think that it was fairly a matter of doubt, whether the instrument in question was within the words and meaning of the 55 G. 3, c. 184, or not, I should have held that it was properly received in evidence without a stamp. But I entertain no doubt. It certainly is no part of the definition of an attorney, either in Comyn's Digest, or in Co. Litt., that the party must be authorized to *857] exercise a discretion. It is enough, *that he is authorized to do an act for, and in the name of, his principal. In the present case,

(a) "Atourner" is "to substitute," and an attorney is a person substituted, "atourné," for his principal. The appropriate form of appointing an attorney in a suit is, therefore, "*A. R. ponit loco suo C. D. (or C. D. attorney suum) ad lucrandum ad perdendum.*" So, the operation by which one lord is substituted for another, is properly "an attornment," though the term has been latterly confined to the concluding act by which the substitution is ratified and made complete,—that by which the vassal or tenant expresses his assent to such substitution.

(b) Co. Litt. 52 a, b,—i. e. a letter under seal, a deed, as explained by Coke himself.

(c) But the word "letter" is used in one sense here, (as *epistola*), and in another by Lord Coke, (as *litteræ sigillatæ*.) Vide post, 857, n.

(d) The contract would be unilateral,—the consideration contingent. It is not unusual to guaranty the repayment of advances which the banker does not engage to make, or the price of goods which the dealer does not undertake to sell. Here, the contract seems to be,—to be responsible for the bills, in case Harrison should raise a consideration by endorsing them.

the party is expressly authorized to do an act, viz., to endorse bills in the name of Harrison. And, lest there should be any doubt whether they were to be considered as endorsed for value, the principal goes on to say that he will be responsible to his agent or attorney for the due payment of the bills so endorsed. This stipulation cannot affect the construction of the former part of the instrument. I think we are bound to decide this case in accordance with *The Queen v. Kell*, which appears to me to be directly in point.

ERLE, J. I feel compelled to concur with the rest of the court, so far as saying that an authority in writing to endorse bills of exchange, is a letter or power of attorney within the 55 G. 3, c. 184. The only difficulty I feel is, that the words of the schedule are so very wide, that our decision may be thought to extend beyond the particular case. But limiting our judgment to the specific authority here given, I think the rule for a new trial should be made absolute.

Rule absolute.(a)

(a) Lord Coke speaks of a "letter of attorney" as an instrument necessarily under seal, "for letter & attorney is as much as a warrant of attorney by deed, as *litera acquietancie* does signify a deed of acquittance," Co. Litt. 52 a. The legislature, using the same term, imposes upon "letters of attorney" an amount of stamp-duty, corresponding with that laid upon many other instruments under seal.

If it had been objected that the authority was void, not being by deed, the answer probably would have been, that, by the custom of merchants, a written authority without deed is sufficient; in other words, that a "letter of attorney," in the proper sense of the term, was not necessary. And see statute of Merton, c. 10.

*LUARD and BEEDHAM v. BUTCHER and Others. [*858

April 28.

A feigned issue, in the form of a wager, directed under the interpleader act, is not rendered illegal by the prohibition of actions upon wagers in 8 & 9 Vict. c. 109.

The adoption of the form of issue given in the schedule to that act, is not compulsory.

THIS was a feigned issue, in the ordinary form of an alleged wager, under a judge's order, bearing date the 22d of January, 1846, to try whether the plaintiffs, on whose account a cargo of stone had been shipped at Caen, in Normandy, on board the sloop *Bounty*, of Providence, or the defendants, as agents of the owners of the sloop, were, on a certain day, possessed of the cargo.

The issue came on to be tried before MAULE, J., at the first sitting in London, in the present term, when a verdict was found for the plaintiffs.

Kinglake, Serjt., (with whom was *Archbold*,) moved to arrest the judgment, on the ground that the issue in its present form was in direct contravention of the recent act to amend the law concerning games and wagers, 8 & 9 Vict. c. 109. [CRESSWELL, J. That is not the proper form

of motion : there is no *judgment* on a feigned issue.](a) Then the motion will be for a stay of proceedings. The eighteenth section of the statute enacts, "that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void ; and that no suit shall be brought or maintained in any court of law or equity, for recovering any sum of money, or valuable thing, alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event *on which any wager shall have been
 *859] made : provided always, that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute for or towards any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise." And the nineteenth section abolishes proceedings under feigned issues : it recites, that, "whereas many important questions are now tried in the form of feigned issues, by stating that a wager was laid between two parties interested in respectively maintaining the affirmative and the negative of certain propositions ; but such questions may be as satisfactorily tried without such form ;" and enacts, "that, in every case where any court of law or equity may desire to have any question of fact decided by a jury, it *shall be lawful* for such court to direct a writ of summons to be sued out by such person or persons as such court shall think ought to be defendant or defendants therein, in the form set forth in the second schedule to this act annexed, with such alterations or additions as such court may think proper ; and thereupon all the proceedings shall go on, and be brought to a close, in the same manner as is now practised in proceedings under a feigned issue." The form given in the schedule is as follows :—"In the court of Queen's Bench [Common Pleas, or Exchequer, or in any inferior court, as the case may be.] Middlesex, to wit, [or such other county as may be directed.] Whereas A. B. affirms, and C. D. denies [*here state fully the fact or facts in issue,*] and the lord chancellor [or such other court, &c.] is desirous of ascertaining the truth by the verdict of a jury, and both parties pray that the same may be inquired of by the country. Now, let a jury," &c. [CRESSWELL, J. Do you contend that that statute repeals the interpleader act ?] Yes, so far
 *860] as the form of the issue is concerned. [CRESSWELL, J. There is no *contract* here that any body is seeking to enforce. The issue is merely directed for the purpose of trying a pretended contract or wager. Say it is void, if you please : the judge has taken the opinion of a jury upon a disputed fact ; and there is an end of it. [TINDAL, C.J. The stat. 8 & 9 Vict. c. 109, gives *power* to the court to substitute the form of issue set forth in the schedule. [CRESSWELL, J. The parties come before a judge, who directs an issue, which is approved of and

(a) Accordingly it has been held that no writ of error can be brought. *King v. Sumner*, 14 Law Journ., New Ser., Q. B. 248. And see *Snook v. Matlock*, 5 A. & E. 239, 6 N. & M. 763. Vide tamen, ante, 848.

sanctioned and adopted by both. To allow the defendants now to come to the court and to say that the whole is nought, would be allowing them to perpetrate a gross fraud.] This is not a matter of discretion. The act declares all wagers to be absolutely null and void. If the act was not intended to apply to a case of this sort, there was no necessity for the form given in the schedule, which avoids all mention of a wager.

TINDAL, C. J. This is not a wager in the sense of this act of parliament, which applies only to wagers for the purpose of winning or losing money or other valuable thing. Here, the issue was directed to try the right of lien. There is really nothing in the objection.

The rest of the court concurred.

Rule refused.

*BROWN v. GILL. April 29.

[*861

An omission to state in the plaint in a court-baron the nature of the action, is a mere irregularity, which may be waived.

In a suit in a court-baron, the proceedings were alleged to have been taken at a court held "before A., the steward of the said court, a free suitor thereof, and B. and C. and others, free suitors of the said court."

Held, that the court was properly constituted, it being alleged that A. was a free suitor.

Held, also, that A. was properly described as steward of the court, though it was not alleged that he was steward of the manor.

Held, also, that the court was properly described; and that it was sufficient to set forth the names of two only of the free suitors who attended.

UPON a writ of false judgment, directed to the sheriff of Somersetshire, commanding him to cause to be recorded a certain plaint between James Gill and John Brown, in the court of the manor (a) of Taunton and Taunton-Deane, (b) in that county, a record was returned as follows:

"Taunton-Deane, Somersetshire, to wit. The court-baron of Robert Mattock, Esq., lord of the manor of Taunton-Deane, in the county of Somerset, held on the 8th of November, 1843, at the Castle Hall, in and for the said manor, and within the jurisdiction of the said court, according to the custom of the said court and of the said manor, from time whereof the memory of man runneth not to the contrary there used and approved of in the same court and manor, before William Kinglake, Esq., the steward of the said court, a free suitor thereof, and W. Upham, and W. H. Mulford and others, free suitors of the said court.

"Be it remembered, that, at this court, comes James Gill, in his proper person, and now here, in the same court, levies his plaint against John Brown, in a plea of 39s. 11d. in the same court; and he finds pldges

(a) i. e. the court-baron, the only court necessarily incident to a manor; as a manor may exist without a customary court, and the connection of a court-leet with it is merely accidental. The lord may sue for his own debt in his court-baron, for that the suitors are the judges. *En temps*, Edw. I. Fitz. Abr. tit. *Dette*, pl. 177.

(b) Formerly called the manor of Tawnton and Tawndeane, i. e. the manor of the town and of the dene (or valley) of the river Tawn or Tone.

*862] for *prosecuting his said plaint, to wit, John Doe and Richard Roe, and now in the same court here prays process of the same court here to be made to him thereon against the said John Brown in the plea of the said plaint : and it is granted to him, &c. And hereupon it is commanded to the bailiffs of the said manor, and ministers of the same court here, that they summon the said John Brown, within the jurisdiction of the said court, so that he be at the next court, to be held at the Castle Hall, in and for the said manor, and within the jurisdiction of the said court, on Wednesday, the 29th of November instant, at eleven o'clock in the forenoon, to answer the said James Gill in his said plea of his said plaint ; and what the said bailiffs and ministers shall do thereon, that they certify to the same next court. The same day is given to the said James Gill, in and by the same court, to be there, &c. At which same next court, to wit, at the court of the said manor, held at the Castle Hall aforesaid, in and for the said manor, and within the jurisdiction of the said court, on the 29th of November, 1843, before William Kinglake, Esq., steward of the said court, W. Upham, and W. H. Mulford, and others, free suitors of the same court, comes the said James Gill in his proper person, and offers himself against the said John Brown in the plea of his said plaint ; upon which J. Hare, bailiff of the said manor, and minister of the said court, now delivers to the same court the aforesaid precept to him in form aforesaid directed, in all things served and executed, to wit, that he, by virtue of that precept, to him in form aforesaid directed by William Kinglake, clerk of the castle of Taunton, has summoned the said John Brown, within the jurisdiction of the said court, that he be and appear in the same next court, to answer the said James Gill in the plea of the said plaint, as he was commanded : upon which, the said John Brown, being *863] solemnly called, comes into this *court here in his proper person to answer the said James Gill in the plea of his plaint aforesaid : And thereupon the said James Gill, in this same court, puts in his place J. D. Penny, his attorney, against the said John Brown, in the plea of his said plaint ; and the said John Brown, in the same court here, puts in his place J. Oxenham, his attorney, at the suit of the said James Gill, in the plea of the said plaint : And thereupon, in the same court here, the said James Gill prays a day to declare against the said John Brown, in the said plea of the said plaint here, until the next court of the said manor, to be held, at the place aforesaid, on the 20th of December, 1843 ; and it is granted to him, &c. ; and the same day is given to the said John Brown, to be there, &c. : And at which same next court of the said manor, held at the place aforesaid, and within the jurisdiction of the said court, on the 20th of December, 1843, before William Kinglake, Esq., steward of the said court, and W. Upham and W. H. Mulford, and others, free suitors of the said court, come as well the said James Gill as the said John Brown, by their attorneys aforesaid ; and thereupon the said James Gill, by his said attorney, now declares here in the same court against the

said John Brown in the said plea of the said plaint, in form following, that is to say:

“At the manor court of Taunton-Deane, in the county of Somerset, held at the castle of Taunton, on Wednesday, the 20th of December, 1843. Somersetshire, to wit, James Gill, the plaintiff in this suit, by J. D. Penny, his attorney, complains of John Brown, the defendant in this suit, who has been summoned to answer the plaintiff in an *action of debt*: for that whereas, &c. [The record then set out the declaration, the defendant’s pleas, the replications thereto, a prayer of amendment by the plaintiff, a rule to declare, an amended declaration, an imparlance, pleas to the amended declaration, *replications thereto, a demurrer to the replications to certain of the pleas, a judgment for the plaintiff thereon, an award of *unica taxatio*, and a *venire* to try the issues in fact—the whole proceedings being alleged to have taken place at courts respectively held “before William Kinglake, Esq., steward of the said court, and W. Upham and W. H. Mulford, and others, free suitors of the said court.” The record then stated a trial, on the 13th of October, 1844, “before the said William Kinglake, Esq., steward of the said court, and W. Upham and G. Matthews, and others, free suitors of the said court,” a verdict for the plaintiff with *one farthing* damages and 12d. costs, and a prayer of judgment, the judgment being entered as follows:—]

“It is considered by the said court here, that the said James Gill do recover against the said John Brown the said debt of 39s. 11d., and his damages, costs, and charges aforesaid, by the jurors (a) aforesaid in form aforesaid assessed, and also 10l. for his costs and charges by him about his suit in this behalf expended, by the court here adjudged of increase to the said James Gill, and with his assent; which said debt, damages, and costs amount in the whole to 11l. 19s. 11d.”

The assignment of errors was as follows:—

“And hereupon, on the 10th of November, 1845, comes the said John Brown here, and says that the record aforesaid is vicious and in many respects defective, and that false judgment is given against him in and upon the plaint aforesaid, in this, to wit—that it does not appear by the record aforesaid that the said court of the said manor of Taunton-Deane, held on the 8th of November, 1843, or the several other courts of the said manor held on the several other days and times subsequent to the said 8th of November, 1843, in the said record mentioned, or any or either of them, was or *were held *before any bailiff or steward of the said manor*: and in this also, to wit, that, although it appears by the said record that the said court so held on the said 8th of November, 1843, and the said several other courts held on the several other days and times subsequent to the said 8th of November, 1843, in the said record mentioned, was and were the court-baron and court-”

(a) No error assigned hereon.

baron of the lord of the said manor of Taunton-Deane; yet it appears by the said record that the said court and courts were held before one William Kinglake, Esq., *the steward of the said court and courts*, as well as before the free suitors of the said court and courts, and not before the said free suitors alone, who are by the law of the land the only judges of courts-baron; nor does it appear by the said record that the said William Kinglake, at the times of holding any of the said courts after the holding of the said court on the said 8th of November, 1843, was even a *free suitor* of the said court, or a freeholder within (a) the said manor: and also in this, to wit, that it appears by the said record that the said court so held on the said 8th of November, 1843, was a *customary court* held according to the custom of the said manor of Taunton-Deane; yet the said court assumes to hold pleas of *actions personal*; and it does not appear by the said record that either the said James Gill or the said John Brown held any lands at the will of the lord, and according to the customs of the said manor: and in this, to wit, that it does not appear by the record aforesaid that the said James Gill levied any *plaint* in a plea of *debt* against the said John Brown: and in this, to wit, that it does not appear by the said record that it was, at the said court held on the said 8th of November, 1843, commanded *by the free suitors* of the said court, or freeholders within the said manor, to the bailiffs and ministers of the said manor, that they should summon the said John Brown as in the said record mentioned; nor does it appear by the said record by whom it was so commanded: and also in this, to wit, that the declaration set forth in that behalf in the said record, and the matters therein contained, in manner and form as the same are therein above stated and set forth, are not sufficient in law for the said James Gill to have or maintain his aforesaid plea against the said John Brown: and also in this, to wit, that it does not appear by the said record, that, at the court of the said manor held on the 9th of October, 1844, it was considered *by the free suitors* of the said court that the said replications of the said James Gill to the said third and last pleas (b) were sufficient in law: and also in this, to wit, that it does not appear by the said record, that, at the court of the said manor held on the said 9th of October, 1844, it was commanded *by the free suitors* of the said court, to the said J. Hare, in the said record mentioned, in manner in the said record mentioned; nor does it appear by the said record by whom it was so commanded; and also in this, to wit, that it appears by the said record that the judgment on the demurrer of the said John Brown, in form aforesaid

(a) i. e. of the manor, the lands of the freeholders being within the fee and seigniority of the lord, but not within or parcel of the manor, though their *servires* are parcel of the manor. On the trial of a case of *Knight v. Hardwill* in Q. B., at the Taunton assizes, 3d April, 1847, it was proved by the steward of the manor and clerk of the castle of Taunton, that no freeholders ever attended these courts. The parties here described as free suitors were copyholders, and the court a customary court.

(b) The replications last were demurred to.

given, was given for the said James Gill against the said John Brown; whereas, by the law of the land, the said judgment ought to have been given for the said John Brown against the said James Gill: and also in this, that it does not appear by the said record, that at the court of the said manor, held on the 30th of October, 1844, it was considered *by the free suitors* of the said court, that the said James Gill should recover against the said John Brown in manner and form as in the said record mentioned: and also in this, to wit, that, although it appears by the said *record that the several courts therein mentioned to be holden [867 were holden before certain free suitors of the said court particularly named in the said record, and also before *other* free suitors of the said court, yet that the names or number of such other free suitors before whom the said several courts were so holden, are no where mentioned in the said record: and also in this, to wit, that it appears by the said record that the judgment on the trial of the plea aforesaid, in form aforesaid given, was given for the said James Gill against the said John Brown; whereas, by the law of the land, the said last-mentioned judgment ought to have been given for the said John Brown against the said James Gill; and so the said John Brown says, that, in the said court of the manor of Taunton-Deane aforesaid, false judgment hath in divers instances been given against him in the plaint aforesaid. And he prays that the said judgment, for the above and other defects in the record aforesaid, may be reversed, annulled, and altogether held for nothing, as being false and of no effect; and that he the said John Brown may be restored to all things which he has lost by occasion of the said judgment, &c." Joinder in error.

The case now came on for argument.

Kinglake, Serjt., for the plaintiff in error.(a) The proceedings in the court-baron are throughout described as having taken place before W. Kinglake, "*steward of the said court*," Upham, Mulford, and other free suitors of the same court. If Kinglake had a right to take any part in the proceedings, it could only be as *steward of the manor of Taunton-Deane*, which he is not alleged to be. [ERLE, J. He is also *described as "*a free suitor thereof*." If qualified as a free suitor, [868 he is not disqualified because he is steward also.] The steward of the *manor* is a constituent part of the court. [TINDAL, C. J. The phrase used is common in these proceedings. Comyns speaks of a "*grant of a stewardship of a court-baron*."](b) Assuming, then, that the steward is correctly described, the judgment is the judgment of a court wrongly con-

(a) The points marked for argument on the part of the plaintiff in error, were substantially those stated in the assignment of errors.

(b) Title *Copyhold*, (R. 5,) citing *Howard v. Wood*, T. Jones, 126, 2 Lev. 245, where the court held the grant of a stewardship, of the honour of Pomfret, in reversion, to be good as to the court-baron, but not as to the court-leet, the stewardship of the latter being a judicial office. It has been suggested that, as to matters in law, the steward is the judge of the court-baron. Kitchen's Jurisdiction of Courts, 81. *Tamen quare*.

stituted. This is a common law court-baron, of which the suitors alone are the judges: it differs from the customary court-baron,^(a) of which the steward is the judge. [COLTMAN, J. Does not the averment that the judgment was pronounced by the court, amount to an averment that it was done by the persons who are properly the judges of the court? TINDAL, C. J. How does Kinglake lose his character of free suitor by being steward also?] He is alleged to have been a free suitor in November, 1843: there is no allegation in any of the subsequent proceedings that he still continued to be a free suitor. [TINDAL, C. J. Is not the presumption of law that things remain as they were, unless the contrary be alleged?] In these inferior jurisdictions, the court will infer nothing in their favour: every step must appear to have been properly taken. In *Jones v. Jones*, 5 M. & W. 523, a declaration on a judgment in a county court, stating the court to have been held before *the sheriff and* suitors, was held bad on special demurrer. Lord ABINGER there said: "The words '*before such and such persons*,' I think, necessarily imply that the *869] cause was heard before the persons who were the lawfully *constituted judges of the court: the words '*before the sheriff and suitors*,' therefore, imply that the sheriff is a judge of the county court, which certainly is not the case. If the suitors were to differ in opinion, and the sheriff were to give a casting vote, and thereby decide the question, the judgment would be bad. Suppose a judgment recovered before the court of Common Pleas were pleaded as a judgment recovered '*before the justices of our lady the Queen of the Bench, and the Lord High Chancellor*,' it would be error, and the latter part of the allegation could not be rejected as surplusage." And PARKE, B., said: "The old precedents all describe the court as the county court of the sheriff, held before the suitors, and set out the names of the suitors." That the sheriff is a constituent part of the county court, and the steward of the court-baron, is clear; but it is the suitors alone that are the Judges: *Tinsley v. Nassau*, M. & M. 52; *Tunno v. Morris*, 2 C., M. & R. 298; *Holroyd v. Breare*, 2 B. & Ald. 473; *Jones v. Jones*, ubi supra; *Bradley v. Carr*, 3 M. & G. 221, 3 Scott, N. R. 521. [TINDAL, C. J. The style of the county court is stated by Comyns different from that of the court-baron.^(b) CRESSWELL, J. How can we say that the court is wrongly described when we find an authority so old as the 4th Inst. p. 268, which shows that it has been used for centuries?]

The record states that the plaintiff below levied his plaint against the defendant below "in a plea of 39s. 11d." It is the plaint alone that gives the court jurisdiction; and, as the jurisdiction of the court is limited to particular descriptions of actions, the nature of the action should distinctly appear on the face of the plaint. [CRESSWELL, J. That defect is cured

(a) The customary court is not a court-baron, though usually held with the court-baron

(b) Com. Dig., tit. County, (C. 1.) tit. Copyhold, (R. 8.)

by the declaration, and the defendant's plea. Suppose a writ [*870 of summons were to omit to state the nature of the action, and the defendant were afterwards to appear and accept a declaration, plead thereto, and allow the cause to proceed to judgment; could he then be allowed to take advantage of the omission?]

The names of all the free suitors present on each occasion, though, perhaps, two would have sufficed, should appear in the proceedings: *Lewis v. Weeks*, Carth. 85; *The King v. Mein*, 4 T. R. 480. It might be that the judgment was pronounced by those who are not named.

Channell, Serjt., contra. The case of *Jones v. Jones* does not warrant the inference that is sought to be drawn from it. There, the declaration was held bad because the proper style of the court was not adopted. The style of the county court is thus given in 4 Inst. c. 55; "*Buck. curia prima comitatus E. C. militis, vicecomitis com' predict', tent' apud B. &c.:*" and that of the court-baron in c. 57: "*Curia baronis (a) E. C. militis, manerii sui predicti* (having the manor's name written in the margin,) *tent' tali die, &c., coram A. B., seneschallo ibidem.*" That of the hundred court is given in similar terms in c. 56. And of both these last-mentioned courts, the suitors are stated to be the judges. *Holroyd v. Breare* is a distinct authority that the steward of a court-baron is a *member* of the court. ABBOTT, C. J., there says: "It was contended, in argument, that the defendant Breare, being the steward of a court-baron, was merely the minister of that court, to execute its process, and was not clothed with any judicial character; and it was said that his warrant to the other *defendant was analogous to that of the sheriff to his [*871 bailiff, and rendered him, like the sheriff, civilly responsible for the mis-execution of it. This was contended, on the ground, that in the court-baron, the *free suitors* are the judges; and certainly they are so, for the purposes stated in the authorities which have been cited. We are, however, of opinion that the steward is not merely a minister of that court, but a constituent and essential part of it. *The court cannot be holden without him.*" The case of *Tunno v. Morris*, 2 C., M. & R. 298, 4 Dowl. P. C. 224, seems to put the sheriff in the same position with respect to the county court, though he clearly is not a constituent part of the court in the same sense that the steward of the court-baron or hundred court is. In Bacon's Abridgment, tit. *Courts*, vol. ii. p. 205, 5th & 6th ed., there is a case precisely in point: (b) "In an hundred court, the plea was laid to be *coram seneschallo et sectatoribus*: Serjt., *Newdigate* took an exception to it, that it should be laid to be held *coram seneschallo per sectatores*: but WYNDHAM, ATKINS, and SCROGGS thought it well enough;" the chief justice, contra. With respect to the omission of the names of some of

(a) Or rather *curia baronum*, the *barones* being the free tenants holding of the manor. It is the sheriff's *curia comitatus*, the lord's *curia baronum*, in which the *comitatus* and the *barones* do service as the judges *ratione tenuræ*. And see M. 6 E. 4, fo. 3, pl. 9, Gilbert's *Tenures*, by Watkins, 269, (210,) *Law Review*, vol. v. p. 169.

(b) *Clever v. Curteis*, P. 30 Car. 2.

the suitors—it is enough if the names of *two* free suitors present be mentioned, two freeholders only being necessary to preserve the manor.(a) *The King v. Mein* is wholly inapplicable: there the election appeared to have been made by unqualified persons.

Kinglake, Serjt., in reply. It is quite clear from the case of *Jones v. Jones*, that it is improper to allege a county court to have been held before *the sheriff and suitors*; and it is equally clear, according to *Tunno v. *872] *Morris*, that the steward of a court-baron stands precisely upon the same footing in this respect. No inference is to be drawn in favour of the proceedings in these courts, which are not courts of record. It must be shown that all has been done that is essential to give them legal authority.

TINDAL, C. J. It appears to me that the judgment of the court below in this case ought to be affirmed. Four objections have been taken to the regularity of the proceedings. The first was, that Mr. *Kinglake*,—who is alleged to be the steward of *the court*,—does not also appear to be the steward of *the manor*: and it was said (but for this no authority was cited) that it was not competent to him to preside in the court unless he was steward of the manor. In Comyns's Digest, tit. *Copyhold*, (R. 8,) it is said: (b) “The style of the court contains the time and place, and before what steward it is held.” And then the style is given as follows:—“*Visus franc' pleg' (c) cum curiâ baron' J. B., militis, domini maneris prædict', ibidem tent' die Jovis, videlicet, 12^o die Octobris, anno regni, &c., fidei defensoris, &c., 19^o, coram A. B., arm., seneschallo ibidem;*” not calling him steward of the manor. In Co. Litt. 61 b, it is said: “Every steward of courts is either by deed or without deed; for, a man may be retained a steward to keep his court-baron and leet also belonging to the manor, without deed, and that retainer shall continue until he be discharged.” And it is matter of daily experience that persons hold these courts by deputation, who are not stewards of *the manor*.(d) This objection, therefore, fails.

*873] *The next objection,—and that upon which the principal reliance was placed,—was, that the proceedings appear to have taken place before an improperly constituted court. If that be so, then undoubtedly the jurisdiction fails. The style of the court, as set out in the return, is—“The court-baron of Robert Mattock, Esq., lord of the manor of Taunton and Taunton-Deane, in the county of Somerset, held on the 8th day of November, 1843, at the Castle Hall, in and for the said manor,

(a) On the other hand, if the lord alien or enfranchise all the demesnes, although the manor is destroyed, the court-baron remains, and must be held by the lord in respect of that which has now become a seigniori in gross,—*un fief en l'air*.

(b) Citing Kitchen, 6 b, 53 b.

(c) This style is applicable only when the lord has a view of frank-pledge or leet, which he holds at the same time with his court-baron, the civil jurisdiction of the latter, and the criminal jurisdiction of the former, being frequently coextensive.

(d) Or stewards at all.

and within the jurisdiction of the said court, according to the custom of the said court, and of the said manor, from time whereof the memory of man runneth not to the contrary, there used and approved of in the same court and manor, before William Kinglake, Esq., the steward of the said court, a free suitor thereof, and W. Upham and W. H. Mulford, and others, free suitors of the said court." If that be incorrect, then all the subsequent proceedings are tainted with the same irregularity. Upon reading this allegation, however, I do not conceive that it necessarily implies that Kinglake was present as *judge* of the court. I think it would be putting an erroneous interpretation upon the language employed, to say that he thereby places himself on the footing of a judge. The steward has a known definite duty to perform, viz., to collect and declare the opinions of the suitors. The suitors, also, have a known definite duty, viz., to adjudicate upon the matters presented to them. The case of *Jones v. Jones*, 5 M. & W. 523, which has been mainly relied upon in support of this objection, came before the court on a special demurrer. That, too, was the case of a *county court*. There is a material difference between the style of the county court and that of the court-baron; and the decision in that case may be perfectly sound as to a county court, and yet not be *applicable to a court-baron. The style of the county court, as [*874 given in Comyns's Digest, *County*, (C. 1.) is: "Essex, to wit. *Curia prima comit' A. B., vic. com. præd. tent. apud D. &c.*" It may, therefore, be usurpation on the part of the sheriff, to call it *his(a)* court, or to say that it was held before him. In the Year Book, 21 H. 6, fo. 34,(b) it seems to have been thought sufficient to describe the county court as held before the sheriff. This second objection, therefore, for the reasons before given, in my opinion discloses no ground of error.

The third objection was, that the plaint does not specify the form of action. That only goes to the formality of the plaint: and the defendant having chosen to appear and plead, the time for taking advantage of the irregularity has gone by. It has been observed, that no intendment will be made in favour of the regularity of proceedings in a court not of record. But I believe the general rule is, that every intendment is to be made in favour of the *regularity* of the proceedings of an inferior court, where the matter appears to have been within its *jurisdiction*.

The last objection was, that the names of *all* the suitors present on the various occasions should have appeared. The first answer to that is, that no authority has been cited to show that it is necessary to name all. Certainly it must be shown that there were *two* free suitors present, otherwise

(a) The form does state the court to be the court of the sheriff; whereas the court-baron is not the court of the steward, but of the lord; see F. N. B. 3.

(b) In that case, (*The Abbot of Tavestocke v. Stourton*, P. 21 H. 6, fo. 34, pl. 22,) the only question was, whether the under-sheriff might hold *plea* upon a *justices*, or whether it must be held by the sheriff himself: nothing was said as to before whom it was to be held, except that the plaintiff in false judgment complained that he was brought to answer, (*meeme en respons*), *coram non iudice*.

there could be no court: *Chetwoode v. Crew*, Willes, 614. But, in the
 *875] absence of any *express authority to show that more must be
 named, and seeing that the mention of an indefinite number could
 only lead to mistake, I think we must hold that two alone will suffice,
 notwithstanding others may have been present.

Upon the whole, therefore, I am of opinion that our judgment must be
 for the plaintiff below.

COLTMAN, J. I am quite of the same opinion. The first objection
 rests on no solid foundation. The passage cited from Co. Litt. 61 b,
 which is also noticed in Comyns's Digest, title *Copyhold*, (R. 5,) and in
 Dyer, 248 a, shows that there is no objection to the officer being described
 as steward of the court. The next, which was the main objection, derives
 some colour from the case of *Jones v. Jones*. That, however, was the
 case of a county court; and it was decided upon a special demurrer for
 not using, in describing the court, the style consecrated by ancient usage.
 The case cited from Bacon's Abridgment is a much closer authority. It
 was there held, by three judges against one, that the hundred court was
 well described to have been held before "the steward and the suitors."
 As to the third point, it sufficiently appears that the court had jurisdiction,
 and that the irregularity was waived. And as to the fourth point, the
 objection rests on no authority. I agree with the Lord Chief Justice, that,
 the names of two suitors,—which are required to constitute a court,—
 being set out, it was not necessary to mention the names of any more.

CRESSWELL, J. I also am of opinion that our judgment must be for the
 defendant. I do not think it necessary to add any thing upon the first two
 objections. As to the third,—I believe it is not necessary in the inferior
 *876] courts to enter the plaint at length. *That appears from *Bishop v.*
Kaye, 3 B. & Ald. 605. All that the record there showed was, that,
 on the 22d of October, 1817, Kaye levied a certain plaint against Bishop,
 whereupon a summons issued, returnable on the 5th of November, and a
capias afterwards issued to arrest the defendant, returnable on the 19th
 November. If, however, it had been necessary to specify in the plaint the
 nature of the action, the omission so to do clearly could not be taken
 advantage of in this stage of the proceedings. The fourth objection was
 rested entirely upon the authority of *The King v. Mein*. That was an
 information in the nature of a *quo warranto*, calling on the defendant to
 show cause by what authority he claimed and exercised the office of port-
 reeve of the borough and manor of Fowey, in Cornwall: the defendant
 pleaded an immemorial custom for the homage of the free tenants of the
 borough and manor to elect and present one of the free tenants as a fit
 person to be port-reeve, &c., and that, at a certain court, the homage of
 the free tenants, to wit, A. B., C. D., and others elected and presented
 him, &c.: the replication, amongst other things, denied that certain per-
 sons, twenty-three in number, (two of them being the persons named in
 the plea,) were, at the time of holding the court, free tenants of the

borough and manor; and the jury found that two only of the twenty-three persons named in the replication were free tenants of the borough and manor. ASHHURST, J., said: "When a defendant makes it a part of his title, that a court at which he was elected was held before twenty-three homagers, he cannot afterwards rely on this, that *two* of them were of that description." I am at a loss to perceive what bearing that case has upon the present. Upon the whole, I think the judgment of the court below must be sustained.

*ERLE, J. I concur with the rest of the court, for the reasons [*877 already given at sufficient length.

Judgment for the defendant.

ROSS v. HILL. April 30.

In *assumpsit* against a cab proprietor, the declaration stated, that the plaintiff hired the vehicle, and that, in consideration of the premises, and that the plaintiff, with his luggage, would become a passenger, and of certain reward, the defendant promised the plaintiff to carry and convey him and his luggage *safely and securely* from, &c., to, &c., and alleged a loss of part of the luggage by the negligence of the defendant's servant:—

Held, that the declaration was sufficient to charge the defendant for a breach of his implied duty to use an ordinary degree of care—the words "*safely and securely*" not necessarily importing a more extended liability.

ASSUMPSIT. The first count of the declaration stated, that, before and at the time of the making of the promise, and committing of the negligence, by the defendant, thereafter mentioned, and before the commencement of this suit, the defendant was the proprietor of a certain hackney carriage, to wit, a common hackney cabriolet, which hackney carriage, during all the time aforesaid, was under the care, management, and direction of a certain servant of the defendant, and, before and at the time of the making of the defendant's promise hereinafter mentioned, was standing and plying for hire at a certain place within the limits of the metropolitan police district, to wit, the terminus of the Great Western Railway, at Paddington, in the county of Middlesex; and thereupon, theretofore, and after the passing of a certain act of parliament made and passed in the seventh year of the reign of her present majesty, intituled "An Act for regulating hackney and stage carriages, in and near London," (a) to wit, on the 8th of October, 1845, the plaintiff, at the request of the defendant, (b) hired the said hackney carriage of the *de- [*878 fendant to convey and carry the plaintiff and his luggage which he then had with him, to wit, a certain portmanteau of the plaintiff, containing divers goods and chattels, to wit, twenty coats, &c., &c., of great

(a) 6 & 7 Vict. c. 86

(b) The contract being executory, as well as one of mutual benefit, it appears to be immaterial at whose request it was entered into; see *Fisher v. Pyne*, 1 M. & G. 265, n.; *Victors v. Davis*, 21 Law Journ. 214.

value, to wit, 20*l.*, and a certain other portmanteau of the plaintiff, containing divers other goods and chattels of the plaintiff, to wit, twenty other coats, &c., &c., of great value, to wit, 20*l.*, and also one box of great value, to wit, 50*l.*, and also one Rebecca Burt, with her luggage she then had with her, to wit, one portmanteau and one box, from the said place, to wit, the said terminus of the Great Western Railway, to a certain other place, to wit, Gerrard's Hall, Basing Lane, in the city of London, and there, to wit, at the last-mentioned place, to set down the said Rebecca Burt and her said luggage, and then to carry and convey the plaintiff and his said luggage from the last-mentioned place to a certain other place, to wit, Bridge Street, Southwark, in the county of Surrey: that, thereupon, to wit, on the day and year aforesaid, in consideration of the premises, and that the plaintiff, together with his said luggage, would, at the request of the defendant,^(a) become and be a passenger, to be carried and conveyed in the said hackney carriage of the defendant as aforesaid, and of certain reward to the defendant in that behalf, he the defendant, as and being such proprietor of the said hackney carriage as aforesaid, then promised the plaintiff to carry and convey him and his said luggage, in the defendant's said hackney carriage *safely and securely* from the same place, to wit, the said terminus of the Great Western Railway, to the said other place, to wit, Gerrard's Hall aforesaid, and at the last-mentioned place to set down the said Rebecca Burt and her luggage, and then to carry and convey the plaintiff and his said luggage *safely and*

*879] **securely* from the last-mentioned place to the said other place, to wit, Bridge Street, Southwark, aforesaid; and that the plaintiff, confiding in the said promise of the defendant, did, with his said luggage, then, to wit, on the day and year aforesaid, become and be, and the defendant then accepted and received the plaintiff as such passenger, to be carried and conveyed, with his said luggage, in and by the said hackney carriage of the defendant as aforesaid, and the said Rebecca Burt, together with her said luggage, then also became and was a passenger in the said hackney carriage of the defendant: Breach,—that the defendant, not regarding his duty as such proprietor of the said hackney carriage as aforesaid, or his said promise, did not nor would carry or convey the plaintiff and his said luggage in the defendant's said hackney carriage *safely and securely* from the said place, to wit, the said terminus of the Great Western Railway, to the said other place, to wit, Gerrard's Hall aforesaid, and from thence to the said other place, to wit, Bridge Street, Southwark, aforesaid; but, on the contrary thereof, he, the defendant, being such proprietor of the said hackney carriage as aforesaid, so carelessly and negligently behaved and conducted himself, to wit, by his said servant in that behalf, in and about the premises, that, by and through the mere carelessness, negligence, and improper conduct of the defendant, to wit, by his said servant, and not otherwise, part of the plaintiff's

(a) See note (b), ante, p. 877.

said luggage, to wit, one of the said portmanteaus, and the said contents thereof, being of the value, to wit, 20*l.*, aforesaid, and whilst the plaintiff was being carried and conveyed in the said hackney carriage of the defendant as aforesaid, and before the commencement of this suit, to wit, on the day and year aforesaid, became and was and is wholly lost to the plaintiff.

There was also a count for money found due upon an account stated.

*Plea—first, non-assumpsit—secondly, (to the first count,) that the plaintiff did not, with his said luggage, become a passenger, to be carried or conveyed, with his said luggage, in or by the said hackney carriage of the defendant, in manner and form alleged—thirdly, (to the first count,) that the defendant behaved and conducted himself in and about the premises, with care, attention, and proper conduct; without this that he behaved and conducted himself, in and about the premises, with carelessness, negligence or impropriety—fourthly, (to the first count,) that one of the said portmanteaus, and the contents thereof, was not, nor were any or either of them, or any part thereof, lost whilst the plaintiff was so being carried and conveyed as aforesaid, in manner and form alleged. Issue thereon. [*880]

The cause was tried before TINDAL, C. J., at the sittings in London, after last Michaelmas term. It appeared that the plaintiff had hired the defendant's cab to convey him from the terminus of the Great Western Railway, at Paddington, to Gerrard's Hall, as stated in the declaration, and that, during the journey, a portmanteau containing wearing apparel, part of the plaintiff's luggage, was lost from the roof of the vehicle. There was no special contract proved with regard to luggage.

On the part of the defendant, it was submitted that there was a variance between the consideration and the promise, the contract stated in the declaration casting upon the defendant the liability of an insurer, as a common carrier, which he clearly was not; and the cases of *Middleton v. Fowler*, 1 Salk. 282, and *Upshare v. Aidee*, 1 Com. Rep. 25, were cited.

A verdict having been found for the plaintiff,

**Murphy*, Serjt., in Hilary term last, pursuant to leave reserved, obtained a rule nisi for a nonsuit. [*881]

Byles, Serjt., now showed cause. It will not be contended that the liability of this defendant is that of a common carrier. He is not, in truth, so charged in the declaration. The words upon which the objection is raised, are used in all the precedents, as well ancient as modern, to designate the liability of a bailee, whatever that liability may be, and whatever may be the degree of care he is bound to use. There are three descriptions of bailment known to the law: 1. A bailment which is for the benefit of the *bailor*—where goods are delivered to one to keep without reward: there, a very slight degree of care only is necessary. 2. Where the bailment is for the sole benefit of the *bailee*—where goods are lent gratuitously: there, a greater degree of care is required. 3. A

bailment, where the benefits are mutual—as, goods let to hire, and the case of a common carrier: there, the bailee becomes an insurer.(a) In *Coggs v. Bernard*, 2 Ld. Raym. 909, 1 Com. R. 133, 2 Salk. 735, Smith's Leading Cases, 82, Lord Chief Justice HOLT states the true meaning of the words "safely and securely," thus: "Suppose the bailee undertakes safely and securely to keep the goods, in express words; yet that would not charge him with all sorts of neglects; for, if such a promise were put into writing, it would not charge so far even then." In Clift's Entries, 40, in case against a lighterman *pro submersione bonorum*, the duty is alleged to be "*salvo et securè deliberandum*," and the breach is assigned, as here, charging negligence. [CRESSWELL, J. The defendant is there called *communis remex*, which seems to imply that he was a common carrier. ERLE, J. It is consistent with that entry, that it was a case of *882] "express contract." In Rastall's Entries, 3 b, in case for negligently using a crane, whereby the plaintiff's goods were damaged, the duty alleged is, "*salvo et securè, absque damno proprietarii, cranare*." [ERLE, J. That makes him an insurer.] In Rastall, 7, in case for misusing a deed, the bailment is alleged to be "*salvo et securè custodiend.*"(b) So, in Rastall, 8, in case for negligently keeping a fire,(c) the custom is laid, "*salvo et securè custodire teneatur, ne pro defectu debite custodiæ, ignis hujusmodi, damnum aliquod vicinis suis eveniat ullo modo*."(d) [CRESSWELL, J. Is there any difference between case and assumpsit?] Rastall, 9, was assumpsit against a bailee of a purse, and the promise was laid "*ad salvo custodiendam cistam super se assumpsit*." [CRESSWELL, J. That may have been an express promise.] In Rastall, 8, the promise was laid "*quod idem R. prædictos sex annulos aureos salvo et securè ad usum prædicti T. custodiret et eidem T. deliberaret*." In Rastall, 209, in detinue for charters, the bailment is alleged to be "*salvo custodiend., et eidem L., cum requisitus fuisset, reliberand.*"(e) In Brown's Entries, 55, the undertaking of a common carrier is laid to be "*bene et fideliter deliberare vel deliberari causare vellet*." In the same book, fo. 80, in an action against an innkeeper for negligently keeping a traveller's horse, the custom is laid "*salvo et securè custodire diè et nocte teneantur*;" and, in fo. 81, the bailment is "*salvo custodiend.*"(f) [CRESSWELL, J. Is not an innkeeper liable for goods stolen from the inn?] Yes: but not for a loss of goods by fire, as a common *883] carrier is. In Brownlow Redivivus, 13, the "duty of an innkeeper is laid to be "*bona et catalla infra hospitium sua prædict. existent absque aliquibus diminutione sive dampno diè et nocte salvo et securè*

(a) Upon a hiring, less care is required than where the bailee alone is benefited.

(b) There the deed was maliciously torn by the gratuitous depositary.

(c) Before the statute 6 Ann. c. 31, s. 6, and 14 G. 3, c. 78, s. 86. And see Robinson's Entries, 41.

(d) See also Brown's Entries, 29, post.

(e) See also Rast. Ent. 210 b, 211 b, 212 a, 212 b, 213 a, 214 b.

(f) And see Brown's Entries, 147, 148, 149; Robinson's Entries, 11, 21, 22; *Rephed v. Pickford*, 5 M. & G. 551.

custodire teneantur, ita quod per defcū negligentiam sive injuriam humoꝝ hospitatorū sive servient. suorum aliquod dampnum, &c." So, fo. 16, against a carrier, (not stating him to be a common carrier,) the bailment was "*ad carriandum salvo et securè*," and the promise accordingly. There, the defendant pleaded that he was a carrier, and that the goods were feloniously stolen, *absque hoc* that he promised *ad carriandum salvo et securè, modo et formā*, showing that the words "*salvo et securè*" may, *per se*, denote different degrees of liability. In *Registrum Brevium*, 108, the undertaking of a bailee for reward, (not a common carrier,) is alleged to be *salvo et securè duccend.*:" and fo. 110, is the form of a writ against a gratuitous bailee, which is *salvo et securè carriandum.*"(a) These authorities show that the old form of declaring against bailees of all sorts, was, to charge them with a duty "*salvo et securè*" to keep and to deliver. The modern precedents are to the same effect. In 2 Chitty on Pleading, (6 edit.) p. 211, the promise of a bailee of goods without reward, is said to be "to take due and proper care of, and *safely and securely* keep, the goods intrusted to him. So, p. 224, the promise of a wharfinger, (who is not an insurer,) is laid to be "*safely and securely* to keep" the goods. So, against common carriers, *p. 228, 233, &c.; case against a stage-coach proprietor, p. 460, 461; against an innkeeper, p. 467; and against a bailee without reward, p. 474.(b) In *Harris v. Costar*, 1 C. & P. 637, which was an

(a) And see Lilly's Entries, 84, where, in case by a passenger against a carrier for damages for overturning his wagon, whereby the plaintiff's collar-bone was broken, the declaration alleges "that the plaintiff, at the special instance and request of the defendant, entered into his wagon, to be conveyed and carried *safely and securely*." See also Brownlow, 45; Robinson's Entries, 31, 69.

In *Mytton v. Cock*, 2 Stra. 1099, in case for not delivering a cartoon, the breach alleged was, the not delivering it *safe*, although there was no express agreement to take care of it, or to re-deliver it *safe*, or for any reward to the defendant.

(b) In 3 Wentw. Pl. 125, in an action against the bailee of a horse, (not being a common carrier,) the promise is laid "*safely and securely* to convey and deliver." So, p. 225, in assumpsit for not returning a mare let to hire, the promise is, "to take care of the said mare in the said journey, and to ride the same in a reasonable manner, and to return the said mare to the plaintiff, at the end of the said journey, *safe*, and in like good order and condition."

P. 231, in an action against a carrier, (now stated to be a common carrier,) the promise is laid "*safely and securely* to carry and transport." P. 248, in an action against the owner of an errand cart, (not stating him to be a common carrier,) the promise is laid "*safely and securely* to carry and convey, and *safely and securely* to deliver." P. 254, in an action against the proprietors of a stage-coach for the loss of luggage of a passenger, the promise is in like manner laid "*safely and securely* to carry, and *safely and securely* to deliver." P. 260, in an action against a barge owner, (charged as a depositary of goods, to be kept and delivered for hire, not as a common carrier,) the promise is laid, "that the defendant would take great care of, and would *safely and securely* keep, the said goods." P. 266, in an action against a ferryman, the promise is laid, "to take care of, and *safely and securely* keep, carry, and convey." P. 269, in an action against a carrier by water, the promise is laid "*safely and securely* to carry, transport and convey the said goods." P. 276, in an action against a lighterman, the promise is laid, "*safely and securely* to carry and transport the said goods and merchandizes from the said quay unto the said ship, and there "*safely and securely* to load and put the same on board the said ship." P. 288, in an action against a wharfinger, the promise is laid "*safely and securely* to keep and preserve the said goods."

And see 2 Wentw. 233, 234, 235, 237, 239, 241, 242, 244, 246, 250, 252, 256, 257, 273.

In 8 Wentw. 402, in case by a coach-proprietor against his coachman for losing a trunk, *per quod* the plaintiff was obliged to pay for it,—the declaration expressly alleges that the trunk was delivered to the plaintiff to be "*safely and securely* carried and conveyed, and to be *safely*

*885] action against coach-proprietors *for an injury sustained by the plaintiff from the overturning of a coach, the declaration alleged it to be the defendant's duty to carry the plaintiff safely, &c., and BEST, C. J., said: "If it had been the first time that this form had been used, I should have said it did not mean that the coach-proprietors undertook to carry safely, absolutely; but that it was to be construed like all other instruments, taking the whole together, and that the defendants were to use due care." In *Dudley v. Smith*, 1 Campb. 167, a declaration in case against the owner of a stage-coach, stated, that the plaintiff became and was an outside passenger on the defendant's coach, to be *safely and securely* conveyed thereon from a certain place to a certain other place, and that it was thereupon the duty of the defendant to have so conveyed her: and the defendant was held liable for a breach of that duty. In *Cairns v. Robins*, 8 M. & W. 258, goods were forwarded by a carrier's wagon to A., in London, and delivered by the carrier to him. A. sent them back to the carrier's warehouse, with directions that they should remain there to await his orders. They remained there accordingly for upwards of a year, when they were lost out of the warehouse. A printed bill issued by the carrier, and sent to A. with the goods, stated that "any goods that should remain three months in the warehouse without being claimed, or on account of the non-payment of the charges thereon, would be sold to defray the carriage or other charges thereon, on the general lien, as the case might be, *together with warehouse rent* and expenses." The carrier had often before carried goods to A., but no goods of his had before lain in the carrier's warehouse. It was held, that the carrier was not, under these circumstances, a mere gratuitous bailee of the goods at the time of their loss; and therefore that A. might recover against him the value of the goods, on a *declaration in *assumpsit*, alleging that they were delivered to the defendant to be *safely* kept for the plaintiff, for certain reasonable compensation and reward to be therefore paid by him. In *Beauchamp v. Powley*, 1 M. & Rob. 38, in case against a stage-coachman for the loss of a parcel, the second count stated that the plaintiff caused the parcel to be delivered to the defendant to be kept and *securely* conveyed and delivered, &c.; and Lord TENTERDEN said, that, "if the coachman received it, it was his duty to *take care* of it, and deliver it at the office in Holborn, to which it was addressed." So, in *Brind v. Dale*, 8 C. & P. 209, 2 M. & Rob. 80, where the declaration alleged that the defendant was a common carrier, and undertook to carry *safely*, Lord ABINGER thought that the defendant was not chargeable as a common carrier; but he observed: "I should say that this was a contract by the defendant to carry *safely and securely*, as far as regards the neglect

and *securely* delivered." So, p. 417, in case against a livery stable-keeper, the duty is laid "safely and securely to keep the plaintiff's horse." And in p. 503, in case against a carrier by water, for losing part of the goods intrusted to him, the defendant's undertaking was laid "safely and securely to carry, and *safely and securely* to deliver, the same."

of himself and his servants, but not to insure the safety of the goods at all events." [ERLE, J., referred to *Gatliffe v. Bourne*, 4 N. C. 314, 5 Scott, 507, 3 M. & G. 643, 3 Scott, N. P. 1, 7 M. & G. 850. In *Selwyn's Nisi Prius*, 7th edit. 408, 8th edit. 416, the rule is thus laid down. "Formerly, the declaration in actions against common carriers stated their employment as common carriers, their liability by the custom of the realm, a delivery to, and acceptance by the defendants of the goods to be carried, for a reasonable hire or reward, concluding with the loss or damage to the goods; but the modern practice is, not to declare in this form, but in assumpsit, and not to state either the employment of the defendants as common carriers, or the custom of the realm (a) as to their liability. This form of declaration has prevailed since the decision of *Dale v. Hall*, M. T. 1750, (b) in which it was settled that it did not make any difference whether the plaintiff declared on the custom, or more generally in assumpsit; for, by stating that the defendant carried for hire, [*887 it would appear that the defendant was a common carrier, and then the law would raise the promise from the nature of the contract. But, although the plaintiff is not bound to allege the custom, yet he must produce sufficient evidence to bring his case within the custom."

Dowling, Serjt., (with whom was *G. Atkinson*), in support of the rule. The liability of a bailee for reward is not so extensive as is here charged. In many of the precedents cited from the old books of entries, the defendants were charged as common carriers: and all of them are consistent with this, either that the contract was executory, or that the bailment was made under an express contract. When those precedents were in use, it was the impression that a bailee was bound to keep and to deliver safely at all events: it had been so laid down in *Southcote's case*, 4 Co. Rep. 84, and in Co. Litt. 89 a. But these authorities are expressly overruled by *Coggs v. Bernard*, which, in effect, disposes of this case: The entry in Rastall, fo. 8, charged no greater degree of duty or liability than the law imposed, viz., liability for an accidental fire: see Vin. *Actions*; (B.) *Tubervil v. Stamp*, 1 Salk. 13. [ERLE, J. The statute of Ann. leaves the party still liable for a negligent fire. (c)] In *Coggs v. Bernard*, the precise nature of the contract does not appear, whether it was alleged as executory or as executed: if the former, it would sustain the promise alleged; if the latter, it would not. (d) And that case is an authority to show that the liability of a bailee of this sort is far less extensive than that which is here sought to be imposed upon the defendant. In none of the cases did the question arise on variance, as here. The [*888 argument on the other side must go the length of saying that "safely and securely" means "with a reasonable degree of care," and

(a) Citing *Hearne's Pleader*, 76, *Vidian's Entries*, 37, 38.

(b) And see S. C. 1 Wils. 281.

(c) And see *Vaughan v. Menlove*, 3 N. C. 468, 4 Scott, 244, 7 C. & P. 525.

(d) See the pleadings, 3 Ld. Raym. Entries, 163, 240, 2 Salk. 735.

nothing more. That, however, is not the true construction of those words. With respect to the nisi prius cases, even if in point, the court would hardly be guided by them upon a question of this sort. In *Kettle v. Bromsall*, Willes, 118, it was held, that, if goods are delivered by A. to B. *to keep safely*, B. is answerable for them to A., though he be robbed of them. [TINDAL, C. J. That was an action of *detinue*, and therefore not very much to the purpose.] In Chitty's Forms, edit. 1844, pp. 248, 249, are various precedents showing that different forms are adopted, according to the different species of bailments. There being, then, precedents both ways, recourse must be had to the principle of pleading that requires all contracts to be set out according to their legal effect. That clearly is not done here. And, if the declaration describes a different degree of liability from that which the law imposes upon the defendant, that may be taken advantage of as a ground of variance.

TINDAL, C. J. The question in this case is, whether the promise laid in the declaration and denied by the plea of non assumpsit, is the promise which the defendant has made. The defendant is only liable in respect of some promise, express or implied. There clearly was no express promise in this case; therefore we must consider whether the promise implied by law be such as is here alleged. Perhaps, if the words "safely and securely" are taken in their strict sense, the promise is laid too largely. The question, however, is, whether they may not receive a more modified construction, and be held to mean—safely and securely, *889] regard being *had to the relative rights and duties of the parties. It appears to me that they may. In the first place, we have had our attention called to a long series of precedents in which the duty or the promise is laid wider than the law would warrant, unless this more extended and liberal construction be given to the words *salvo et securè*, or unless we are to suppose that they were all cases of *express* contracts; and some of them are of such a nature that it is impossible there could have been any express contract. Thus, in the precedent in *Rastell*, fo. 8, where the defendant is charged in case for negligently keeping a fire, the duty is laid, "*salvo et securè custodire teneatur, ne, pro defectu debite custodiæ (a) ignis hujusmodi, damnum aliquod vicinis suis eveniat ullo modo;*" which certainly extends it beyond the degree of care that the law requires. (a) Again, *Rastell*, 3 b, in an action against the owner of a crane for improperly craning goods, the defendant's duty is alleged to be, "*salvo et securè, absque damno proprietariis, cranare.*" There, if the words are to be construed strictly, a larger burden is thrown upon the

(a) In *Beaulieu v. Finglam*, P. 2 H. 4, fo. 18, pl. 5, the rule is still more stringently expressed,—"*quare, cum secundum legem et consuetudinem regni nostri Angliæ hactenus obtinuit, quod quilibet de eodem regno ignem suum salvo et securè custodiat, et custodire teneatur, ne per ignem suum dampnum aliquod vicinis suis eveniat.*" S. C. Fitz. Abr. tit. *Action sur le cas*, pl. 25, Bro. Abr. tit. *Action sur le cas*, pl. 30. But see 42 Ass. fo. 259, pl. 9. And see 1 Roll. Abr. 454, pl. 8; 5 Vin. Abr. 244; 2 M. & G. 746, n.; 3 M. & G. 524, n.

defendant than the ordinary degree of care which the law requires: and we cannot suppose that to have been the subject of an express contract. I can only argue and infer from these and the numerous other instances that have been so industriously brought under our notice in the discussion of this case, that we are to construe these words "*salvo et securè*" with reference to the duty or the promise implied by law from the *particular position and relation of the parties, and not in the stricter [890 sense contended for on the part of the defendant. In the present case, the plaintiff hired a cab to convey himself and his luggage to a certain place. The undertaking charged in this declaration, "safely and securely" to convey the plaintiff with his luggage to his destination, means no more than safely and securely *with reference to the degree of care which, under the circumstances, the law required of the defendant*; that is, that he shall use such a reasonable degree of care that the plaintiff shall incur no damage or loss through his the defendant's negligence or default. If it had appeared that the defendant was a common carrier, his duty would have been to carry and deliver safely at all events, without excuse, unless prevented by the act of God or the Queen's enemies. If, on the other hand, he had been a mere gratuitous bailee, then a less degree of care and caution would have been required of him than is required from a bailee for reward. The words "safely and securely," therefore, receive different interpretations with reference to the character in which the defendant is charged. I cannot help thinking that this is expressly decided by *Coggs v. Bernard*. The undertaking there was—"quod cum Bernard, the defendant, the 10th of November, 13 W. 3, at, &c., *assumpsisset salvo et securè elevarè Anglicè*, to take up, several hogsheads of brandy then in a certain cellar in D., *et salvo et securè deponere, Anglicè*, to lay them down again, in a certain other cellar in Water Lane;" and the breach was—that "the said defendant and his servants and agents *tam negligenter et improvidè* put them down again into the said other cellar, *quod per defectum curæ ipsius* the defendant, his servants and agents, one of the casks was staved," &c. No objection was raised that there could be no evidence given of such a duty as that charged in the declaration: but the objection was, that there was no *consideration laid. The [891 whole court, however, held that there was a sufficient consideration; Lord HOLR observing "that the owner's trusting him with the goods was a sufficient consideration to oblige him to a careful management." And I think, further, that, if these words "safely and securely" necessarily and exclusively pointed at the peculiar liability of a common carrier, we should not have found them used in so many precedents of declarations against other descriptions of bailees. Upon the whole, therefore, it seems to me that the precedents cited are sufficient authority to show that the promise in this case is well laid; and that the rule for a nonsuit must be discharged.

COLTMAN, J. Apart from authority, the words "safely and securely"

are undoubtedly open to the observations addressed to us on the part of the defendant. But it seems to me that a long course of authorities has put a construction upon those words, limiting and restricting them to the particular promise or duty, the breach of which is charged. *Harris v. Costar* seems to be precisely in point. The precedents cited, as well ancient as modern, show that it has been usual, in all cases of bailment, to allege the undertaking to be "safely and securely" to keep or convey the goods without regard to the particular degree of care resulting in law from the nature of the bailment; and, in the breach, to impute a neglect of that duty. I therefore think we are warranted in saying that the undertaking alleged here is an undertaking to carry the plaintiff and his luggage with that degree of safety and security which in law results from the relation of the parties.

CRESSWELL, J. Upon consideration, I am bound to say that I have arrived at the same conclusion: and I think that the view we are taking
 *892] is supported both by "authority and the reason of the thing. *Harris v. Costar* is expressly in point. The long and almost uniform course of precedents also tends to show that these words "safely and securely" do not necessarily import absolute assurance, but are to be construed with reference to the character of the party and the nature of the bailment. Even a common carrier is not an insurer in the largest sense; for the law excepts the act of God, and of the king's enemies. In the case of a bailee without reward,^(a) the degree of liability is less than in that of a bailee with reward. This was the opinion of Lord Holt, in *Coggs v. Bernard*. He says, 2 Lord Raym. 915: "Suppose the bailee undertakes safely and securely to keep the goods, in express words, yet even that won't charge him with all sorts of neglects; for, if such a promise were put into writing, it would not charge so far even then: Hobart, 34. A covenant that the covenantee shall have, occupy, and enjoy certain lands, does not bind against the acts of wrong-doers, 3 Cro. El. 214, acc., 2 Cro. Jac. 425, acc., upon a promise for quiet enjoyment. And if a promise will not charge a man against wrong-doers, when put in writing, it is hard it should do it more so when spoken. Doct. & Stud. 130, is in point,—that, though a bailee do promise to re-deliver goods safely, yet, if he have nothing for the keeping of them, he will not be answerable for the acts of a wrong-doer." The same words are used in both cases, and the same promise alleged, and yet they are to be construed with reference to the nature of the bailment: the words must receive a construction more or less extended, regard being had to the character of the person to be charged. It has been said that it does not appear from the judgment in that case, that so narrow a construction was put upon the words "*salvo et securè*." But the declaration charged that
 *893] the defendant *assumpsisset salvo et securè* "elevare the brandies, et *salvo et securè deponere* them; and that the defendant and his

(a) Vide post, 893 (a).

servants and agents *tam negligenter et improvidè* put them down, *quod per defectum curæ ipsius*, the defendant, his servants and agents, one of the casks was staved: and it was moved in arrest of judgment, "for that it was not alleged in the declaration that the defendant was a common porter, nor averred that he had any thing for his pains." Lord Holt says: "Secondly, it is objected that there is no consideration to ground this promise upon, and, therefore, the undertaking is but *nudum pactum*. But to this I answer, that the owner's trusting him with the goods is a sufficient consideration to oblige him to a *careful management*." That learned judge construes the words "*salvo et securè*" as importing an obligation equivalent to a "careful management." I therefore think the authorities sustain this declaration.

ERLE, J. I am of the same opinion. The defendant contends that the words used in this declaration import a promise of absolutely safe conveyance. It appears, however, from the long course of precedents and authorities, that that is not so. The degree of care required by law from a bailee, varies with the nature of the bailment: a gratuitous bailment (a) imposes upon the bailee a less degree of responsibility than a bailment for reward. The distinction is fully pointed out in *Coggs v. Bernard*. Whatever the nature of the bailment, it appears to have been usual to charge generally a duty to use due care, and a breach of that duty. The degree of attention to the safety of the thing with which the defendant is intrusted, is regulated by a reference to the character he fills.

Rule discharged.

(a) Q. d. a gratuitous bailment for the sole benefit of the bailor,—*depositum* or *mandatum*; not *commodatum*,—a gratuitous bailment for the sole benefit of the bailee.

*PARKHURST v. GOSDEN. May 2.

[*894

This court cannot aid a party in obtaining a copy of the notes taken at a trial. An application for a rule, that a defendant might be furnished with a copy of the notes taken by the judge of the sheriffs of London's court on a former trial between the same parties, was refused.

C. JONES, Serjt., moved for a rule calling upon the judge of the sheriffs' court, London, to show cause why the defendant should not be furnished with a copy of the notes taken by him upon a trial between the parties to this action, had before him in the year 1842, upon an affidavit that such notes were material and necessary to the defence of the present action—to enable the defendant's counsel, upon the trial of this cause, to cross-examine the plaintiff's witnesses.

TINDAL, C. J. How can we grant a rule against the judge of the she

riffs' court? I do not know that he is bound to take a note at all.(a) The defendant should have taken care to have some person present at the former trial capable of taking a note of what occurred. Judges' notes are not to be made instruments of attack or defence in the hands of either party.

The rest of the court concurred.

Jones took nothing.(b)

(a) But by the resolution of the judges respecting motions for new trials, in cases before sheriffs and judges of inferior courts of record,—“upon all motions respecting causes tried before sheriffs or judges of inferior courts of record, pursuant to the statute (3 & 4 W. 4, c. 42.) ss. 17, 18, the party making the application to the court above must produce an examined copy of the notes of the sheriff or his deputy, or of the judge who tried the cause, together with an affidavit verifying such to be a true copy.” And see *Mansell or Mansfield v. Brearcy*, 1 A. & E. 347, 3 N. & M. 471; *Burney v. Mawson or Moxall*, 1 A. & E. 348, n., 3 N. & M. 473, n.; *Hall v. Middleton*, 4 N. & M. 368; *Walker v. Needham*, 3 M. & G. 557.

(b) *Vide ante*, 874 (b).

*895] *ZULUETA and Others v. MILLER and Others. May 7.

A plea framed fairly to raise the question whether the action is not rendered unmaintainable by reason of the non-performance of an alleged condition precedent, is an issuable plea.

ASSUMPSIT. The declaration stated, that, on the 2d of November, 1844, by a certain agreement in writing, dated, &c., then made between the defendants on the one part, and the plaintiffs on the other part, and signed by the plaintiffs and the defendants respectively, it was agreed that the defendants should furnish a pair of direct-acting steam-engines of the collective power of three hundred and fifty horses, of the best materials and workmanship, fitted complete with expansion valves and gear, tubular boilers, safety-valves, nozzles, and gear, stop-valves, nozzles, and gear, brine-pumps and refrigerators or other suitable apparatus, a small engine to fill the boilers, water-gauges and gauge-cocks, hand-pump and leather hose, feed, injection, and blow-off pipes and cocks; all the pipes of copper that could with propriety be made of that material, chimney and steam-chest casing, paddle-wheels and flats, coal-cases, fenders, ladders, and flooring-plates, including a complete set of engineers' tools to work the engines, and extras as per a certain list No. 1, which then accompanied the said agreement, erected on board, painted and ready with every metallic part complete to set to work, for 15,050*l.*; and, further, to supply the duplicates, extras, and stores, as per a certain list No. 2, which accompanied the said agreement, for 1640*l.*; and that the engines should be completed ready to be put on board in eight months from the date of the said agreement; and the consumption of fuel to be 5 lbs. of good coal per horse-power per hour; and that the plaintiffs should pay them the said sums in the following manner, viz., one-fourth part on signing the

said *agreement, one-fourth part when the engines should be half finished, one-fourth part when the engines should be ready to put on board, one-fourth part when the engines should be completed on board. Averment, that the said agreement being so made as aforesaid, afterwards, and before the commencement of the suit, to wit, on the day and year aforesaid, in consideration thereof, and that the plaintiffs, at the request of the defendants, had then promised the defendants to perform the said agreement in all things on the defendants' part to be performed, the defendants then promised the plaintiffs to perform the agreement in all things on the defendants' part to be performed; that the plaintiffs did, on signing the said agreement, to wit, on the day and year aforesaid, and long before the commencement of the suit, pay the defendants one-fourth part of the said sum of 15,050*l.*, and they the plaintiffs, at the time when the said engines ought, according to the said agreement, to be completed ready to be put on board, and at the time when they ought, according to the said agreement, to have been completed on board respectively, were ready and willing to receive the same on board, and to permit and allow the same to be put and completed on board respectively, (to wit, on board a certain vessel then provided for the reception of the same, and on board whereof the defendants could and might have put and completed the same if they had been ready to perform the said agreement on their part and their said promise;) and the plaintiffs were at all times from the making of the said agreement, to wit, until the commencement of the suit, ready and willing to perform the said agreement on their part and their said promise—of all which the defendants then had notice: that, after the making of the said agreement, and after the date thereof, eight months elapsed before the commencement of the suit; yet the defendants did not nor would *complete the said engines, nor were the same completed ready to be put on board in eight months from the date of the said agreement, or at any other time, nor were the same so put on board; and by reason of the premises, and for want of the said engines on board thereof, the said vessel of necessity could not be profitably employed, and lay unemployed for and during a long time, to wit, eleven weeks, which elapsed after the expiration of the said eight months, and before the commencement of the suit; and thereby the plaintiffs then lost the profit of employing the same, and thereby also the said vessel, and certain seams and open spaces thereof, were of necessity, during the time aforesaid, kept open and uncaulked, and exposed to the rain and weather, which thereby then, during the time aforesaid, greatly wetted, rotted and damaged the said vessel; and thereby also the plaintiffs sustained great loss of profit which they otherwise would have made, &c.

The defendants, after having obtained time to plead on the usual terms, of pleading issuably, rejoining gratis, and taking short notice of trial, pleaded—that, although, after the making of the agreement in the declaration mentioned, and within the said space of eight months from the

date of the said agreement, and before the commencement of the suit, to wit, on the 1st day of March, 1845, the engines in the declaration mentioned duly were by the defendants half finished, according to the terms and meaning of the said agreement, of which the plaintiffs then had notice; yet the plaintiffs did not nor would then, although they were then requested so to do by the defendants, or at any other time before the commencement of the suit, pay to the defendants one-fourth part of the said sum of 15,050*l.*, or any part thereof, according to the terms and meaning of the said agreement; and that the plaintiffs then, and thence *898] hitherto, had wholly refused so to do; contrary to the terms and meaning of the said agreement, and of their promise so made as aforesaid—verification.

The plaintiffs, treating this as a non-issuable plea, signed judgment on the 28th of November last. On the 9th of December the parties attended before COLTMAN, J., at chambers, upon a summons taken out by the defendants to set aside such judgment for irregularity, when that learned judge stayed the proceedings until the fourth day of Hilary term, in order to give the defendants an opportunity to make the application in court.

Channell, Serjt., accordingly, on the fourth day of the last term, obtained a rule nisi.

Sir T. Wilde, Serjt., (with whom was Aspland,) on a former day in this term showed cause. This is clearly not an issuable plea: no issue could be taken upon it that would decide the action upon its merits. It is consistent with a perfect breach by the defendants, of the agreement they have entered into. The defendants must resort to their remedy by cross action. The plea is evidently pleaded for the purpose of raising the question whether or not the defendants' obligation to complete the engines was conditional upon the due payment by the plaintiffs of the instalments at the times stipulated for. It is clear, however, that such payment was not a condition precedent. There is not an *entire* failure of consideration. *Pordage v. Cole*, 1 Wms. Saund. 320, and the notes thereto, *Boone v. Eyre*, 1 H. Bla. 273, n.; *Carpenter v. Cresswell*, 4 Bingh. 409, 1 M. & P. 66; *Slavers v. Curling*, 3 N. C. 355, 3 Scott, 740, and *Mattock v. Kinglake*, 10 Ad. & E. 50, 2 P. & D. 343, show distinctly, that, where there are acts to be done by either party, the performance of *899] the whole agreement by the one is not a condition precedent to his right to sue for a breach on the part of the other, unless it be expressly so stipulated, or the thing, the non-performance of which is complained of, goes to the whole consideration. This plea would be sustained by proof of a delay of forty-eight hours in the payment of an instalment, or a payment short by 10*l.* of the stipulated amount. Whether or not a plea is issuable, must depend upon whether it is one upon which an issue can be taken, the decision of which will dispose of the cause one way or the other: that is the principle that will be found to pervade

most of the cases; and it is impugned by one,—*Mackay v. Wood*, 7 M. & W. 420. [*Channell*, Serjt. We rely upon *Staples v. Holdsworth*, 4 N. C. 144, 5 Scott, 432, 6 Dowl. P. C. 196; (a) *Wilkinson v. Page*, 6 M. & G. 1012, 7 Scott, N. R. 961; *Steele v. Harmer*, 14 M. & W. 136.] That is a case in the plaintiffs' favour. [ERLE, J., referred to *Withers v. Reynolds*, 2 B. & Ad. 882.]

Channell, Serjt., in support of the rule. The plea is issuable. A general demurrer is an issuable plea within the meaning of the rule. This plea clearly puts the law in issue, and, if demurred to, will determine the action; the rule is distinctly laid down in *Steele v. Harmer*. The plea is tantamount to a general demurrer, for it is the only plea. The judgment of MAULE, J., in *Wilkinson v. Page*, 6 M. & G. 1014, shows that, to make a plea issuable, it is not necessary that it should be one that goes to the merits, in the popular sense in which the expression is sometimes understood. [CRESSWELL, J. Has it not usually been considered that a plea, to satisfy the rule, must tender an issue of *fact*, which, if traversed, will determine the cause on its merits?] Such, *undoubtedly, was formerly the understanding of the rule. But recent decisions have [*900 somewhat enlarged it. In *Mackay v. Wood*, PARKE, B., says: "That it is to be considered an issuable plea, upon which a decision on demurrer, or by a jury, would determine the action on the merits." And ALDERSON, B., says: "Any plea must be considered an issuable plea, which, being determined in favour of the defendant, shows that the plaintiff has no right of action. The rule to be collected from the decision of this court in *Humphreys v. The Earl of Waldegrave*, 6 M. & W. 622, is, that a plea is an issuable plea which tenders some matter, upon which, if issue be taken, the case would be decided upon the merits." The last case upon the subject,—in which the rule is distinctly and correctly laid down,—is *Steele v. Harmer*, 14 M. & W. 136. There, in an action by the endorsee against the acceptors of a bill of exchange, the defendants, who were under the terms of pleading issuably, pleaded (amongst others) the following pleas,—first, that, after acceptance and before endorsement to the plaintiff, the drawee waived the acceptance, and discharged the defendants from payment thereof, of which the plaintiff had notice.—Secondly, that, after the making and accepting of the bill, and before it became due, it was delivered by the defendants to W. the drawer, and that after it was so accepted and delivered, and while W. was the holder and payee thereof, and before it became due, W. endorsed it to H., one of the acceptors, and then delivered it to H., with the intention of divesting himself, and thereby he did divest himself, of all right, title, &c., in the bill, and of the right of suing thereon, and of endorsing the same again; that it was endorsed to H. for a valuable consideration; that H. continued to be the holder of the said bill always from the time of

(a) And see *Wettenhall v. Graham*, 4 N. C. 714, 6 Scott, 603, 6 Dowl. P. C. 746.

*901] *the endorsement thereof until it was afterwards delivered by H. to the plaintiff; and that, at the time when the bill was so delivered to the plaintiff by H., the plaintiff had notice of all the facts. It was held that these were issuable pleas: and the court thus lay down the rule:—"An issuable plea is that which puts the merits of the cause, either on the facts or the law, in issue—which will decide the action. A plea may ultimately turn out to be bad, but it is not therefore non-issuable, for, if it were, a plea could not be issuable unless it were also a good one." Here, the plea alleges, not a mere failure by the plaintiffs to perform their part of the contract, but an absolute refusal to pay the second instalment. The case is, therefore, substantially, within that of *Withers v. Reynolds*, 2 B. & Ad. 882. R. agreed to supply W. with straw, to be delivered at W.'s premises at the rate of three loads in a fortnight, during a specified time; and W. agreed "to pay R. 33s. per load for each load of straw so delivered on his premises" during the above period. After the straw had been supplied for some time, W. refused to pay for the last load delivered, and insisted on always keeping one payment in arrear: it was held, that, according to the true effect of the agreement, each load was to be paid for on delivery; and that, on W.'s refusal to pay for them, R. was not bound to send any more. Lord TENTERDEN said: "There is, I think, no doubt that, by the terms of this agreement, the plaintiff was to pay for the loads of straw as they were delivered. If that were not so, the defendant would have been liable to the inconvenience of giving credit for an indefinite length of time, and, in case of non-payment, bringing an action for a very large sum of money; which does not appear to have *902] been intended by the contract. The only *question is, whether, upon the plaintiff's saying 'I will not pay for the goods on delivery,' (for, that was the effect of the communication to the defendant,) it was incumbent on the defendant to go on supplying straw; and he clearly was not obliged to do so." And PATTESON, J., said: "If the plaintiff had merely failed to pay for any particular load, that of itself might not have been an excuse to the defendant for delivering no more straw, but *the plaintiff here expressly refuses to pay for the loads as delivered*; the defendant, therefore, is not liable for ceasing to perform his part of the contract." To disallow this plea would be to deprive the defendants of their writ of error. [TINDAL, C. J. To allow it would be to give them an opportunity to carry the plaintiffs through all the courts; which it was the object of the rule to avoid.] The rule does not prevent this, where the defendant demurs generally to the declaration. The question is, whether the point is raised *bonâ fide*.

Cur. adv. vult.

TINDAL, C. J., now delivered the opinion of the court.

This was a rule to show cause why the judgment which had been signed, should not be set aside. The action was brought upon an agreement made between the plaintiffs and the defendants, whereby it was

agreed that the defendants should furnish a pair of direct-acting steam-engines of the collective power of 350 horses; with every metallic part complete to set to work, for 15,050*l.*; and further supply duplicate extras and stores, as per list No. 2, for 1640*l.*; and that the engines should be completed ready to put on board, in eight months from the date of the said agreement; and that the plaintiffs should pay them the said sums in the following manner, namely, one-fourth part on signing the agreement, one-fourth part when the engines should *be half finished, [903 one-fourth part when the engines should be ready to put on board, and one-fourth part when the engines should be completed on board.

The declaration contained an averment of the payment by the plaintiffs of one fourth part at the signing of the agreement, and of readiness and willingness to perform the agreement on their part, and alleged, by way of breach, that the engines were not completed, ready to be put on board, in eight months from the date of the agreement, or at any other time, nor were put on board.

The defendants having obtained time to plead, on the terms of pleading issuably, pleaded, that, although, after making the agreement in the declaration mentioned, and within the said space of eight months from the date of the said agreement, and before the commencement of the suit, the engines in the declaration mentioned were by the defendants half finished, according to the terms and meaning of the said agreement; of which the plaintiffs had notice; yet the plaintiffs did not nor would then, although requested so to do by the defendants, or at any other time before the commencement of the suit, pay to the defendants one-fourth part of the said sum of 15,050*l.*, or any part thereof, according to the terms and meaning of the said agreement; but the plaintiffs then and from thenceforth wholly refused so to do; contrary to the terms and meaning of the said agreement, and of their promise so made as aforesaid.

The plaintiffs thereupon signed judgment: and upon the present motion the question arises, whether the plea pleaded was an issuable plea within the meaning of the order for time to plead.

The plea objected to appears to be pleaded with a view to raise the question whether the defendants were bound to complete and deliver the engines under the *agreement, if the stipulated payments were not [904 made by the plaintiffs as the work proceeded.

It is not necessary for us in the present stage of the proceedings, to pronounce an opinion whether the plea in question is a good plea or not. It is not manifestly a bad plea: on the contrary, it may be thought to raise a fair question of doubt in matter of law, the decision of which will determine the legal rights of the parties upon the merits. It was said by the court of Exchequer, in the late case of *Steele v. Harmer*, 14 M. & W. 139, "An issuable plea is that which puts the merits of the cause, either on the facts or the law, in issue which will decide the action. A plea

may ultimately turn out to be bad ; but it is not therefore non-issuable ; for, if it were, a plea could not be issuable, unless it were also a good one." This is in conformity with the rule before laid down in *Mackay v. Wood*, 7 M. & W. 421, where it was said by PARKE, B., "That is to be considered an issuable plea upon which a decision on demurrer, or by a jury, would determine the action on the merits." We think the plea pleaded in the present case does raise a question of law on which the defendants are entitled to have the deliberate judgment of the court, and the opinion of a court of error ; and that the plea is calculated to bring the question to a decision on the merits, without any unfair delay or embarrassment of the plaintiffs : and we think, therefore, that we shall best meet the justice of the case by following the course adopted in the above-cited case of *Steele v. Harmer*. The rule therefore will be made absolute, the costs to be costs in the cause. Rule absolute accordingly.

*905]

*KEYS v. HARWOOD. May 7.

Where by the terms of a contract a service to be performed by A. for B. is to be paid for in goods, A. cannot declare in debt for the value of the service, but must sue on the special contract. But if B., by his own act, render the delivery of the goods impossible, A. may sue in debt for the value of the service.
So, if B. allow the goods to be sold under an execution against him.

DEBT, for board, lodging, and necessaries, provided by the plaintiff for the defendant and his son, at the defendant's request, for money lent, and for money found due upon an account stated.

Pleas, except as to 6*l.* 3*s.* 6*d.*, never indebted, payment, and accord and satisfaction, and, as to that sum, payment into court.

At the trial before MAULE, J., at the last sitting for Middlesex in this term, the plaintiff claimed 29*l.* 12*s.* 6*d.* as the balance due to him for the board and lodging of the defendant and his son, of the former, at the rate of 25*s.*, of the latter, at the rate of 10*s.*, per week. Upon the cross-examination of the first witness called to prove the plaintiff's case, the defendant's counsel put into his hands a paper (not in the handwriting of the witness,) purporting to be an agreement between the plaintiff and the defendant fixing the terms upon which the defendant and his son were to be boarded by the plaintiff. The witness stated that he had never seen the agreement before ; but he proved the plaintiff's signature thereto. It was thereupon objected that the plaintiff was bound to put in the agreement as part of his case. The learned judge, however, thought otherwise. The agreement was then put in by the defendant. It was as follows :—

“Memorandum of agreement between Edward Keys on the one part, and J. B. Harwood of the other—that I, the said Edward Keys, agree to board and lodge the said J. B. Harwood, in the usual way that boarders

are generally treated, for the sum of 25s. per *week, and his son William Harwood, for the sum of 10s. per week ; being in all 35s. per week ; and, in payment for the above board and lodging, I, Edward Keys, agree to take the furniture deposited in my premises by J. B. Harwood as per inventory annexed, and valued at 28*l.* 10s., provided the said J. B. Harwood continues to board and lodge in his apartments on the first floor until the above 28*l.* 10s. is expended. I also agree to take such furniture as I may want out of the inventory, for the amount due to me, at any time the said J. B. Harwood may want to quit my premises : the furniture in question to be valued by a broker or brokers disinterested to either party.

(Signed “EDWARD KEYS.

“London, December 9th, 1844.”

On the part of the plaintiff it was objected that the agreement was inadmissible, for want of a stamp. The objection was overruled, on the ground that the subject-matter of the agreement did not necessarily appear to be of the value of 20*l.*

It was then insisted on behalf of the defendant, that the plaintiff should have declared specially upon the agreement, instead of declaring generally for board and lodging, to be paid for on request. It appeared, however, that, after the agreement had been entered into, the furniture in question had been taken in execution, and sold, under a judgment obtained against the defendant by a third person, and that the plaintiff was prevented by the defendant's refusal to make an affidavit, from asserting his title to it.

The learned judge left the case to the jury with strong observations upon the conduct of the defendant in withholding his affidavit. The jury returned a verdict for the plaintiff for 23*l.* 9s. beyond the sum paid into court.

**Byles*, Serjt., on a former day, moved for a new trial on the grounds of improper reception of evidence, and of misdirection. He submitted that it was incumbent on the plaintiff to put in the written agreement, inasmuch as its existence became apparent before he had proved his case. [ERLE, J., observed that the defendant's counsel had no right to ask the plaintiff's witness to read a document that was not in his, the witness's, handwriting.] The learned serjeant further insisted that the jury were not properly directed ; for that they should have been told that the effect of the agreement was, to satisfy the plaintiff's claim, *pro tanto*, by the appropriation of the furniture.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court.

The objection raised in this case before my brother MAULE was, that the action was wrongly conceived in point of form ; that, instead of being framed as an action of debt for board and lodging to be paid for on request, the plaintiff ought to have declared on the special agreement proved to have been made between the parties. By the written contract

produced at the trial, the plaintiff agreed to board and lodge the defendant and his son at the weekly sum therein mentioned, and "in payment for the above board and lodging," agreed to take the furniture deposited in his premises by the defendant, as valued at 28*l.* 10*s.* And, undoubtedly, if nothing had taken place after the contract was entered into, to prevent the possibility of its being performed, the objection would have been sustainable.

But, after the contract was made, and before the action was brought, one of the creditors of the defendant recovered a judgment against him, *908] and seized and *sold the furniture in question under his execution upon such judgment. We consider the case, therefore, to be the same, in effect, as if the defendant had himself taken away the furniture, and sold it: and that the plaintiff is, in consequence, entitled to recover the value of the board and lodging by the ordinary action of debt, as if the special contract had never existed. This seems the principle laid down by Lord TENTERDEN in the case of *Baines v. Payne*, 1 Chitty on Pleading, 8th edit. 357.(a) We therefore think the verdict is not to be disturbed.

Rule refused.

(a) And see *Sir Anthony Mayne's case*, 5 Co. Rep. 20, and the record in error, Co. Ent. 244. "And thereupon the case in temp. E. 1, *Covenant 29*, and F. N. B. was put, that although the covenant be that he *leave* the wood in as good plight, &c., at the end of the term, if the lessee cuts down the trees the lessor shall presently have an action of covenant; for it is not possible that he *leave* the trees, &c., at the end of the term; so that the impossibility of this act shall give a present action upon a future covenant." 7 Co. Rep. 15 a. In 5 Co. Rep. 21, it is stated that the covenant in temp. E. 1, was to *keep* (a *garder* in the first edition,) the house, &c., in repair, but this was a mistake, as might have been inferred from the context.

HARRIS v. ROBINSON. May 7.

Where the eighth day after service of a writ of summons falls on any day between the Thursday next before, and the Wednesday next after, Easter-Day, the last day for entering an appearance thereto is the Wednesday next after Easter-Day, the rule of court of Easter term. 2 W. 4, being overridden by the statute 2 W. 4, c. 39, s. 11.

THE defendant was served with a copy of a writ of summons, on Monday, the 6th of April. The plaintiff entered an appearance for him *sec. stat.* on the 16th. On the 18th,

C. Jones, Serjt., obtained a rule nisi to set aside the appearance and *909] subsequent proceedings, for irregularity, *with costs, on the ground that it had been entered too soon. He referred to the rule of Easter term, 2 W. 4, by which it was ordered "that the days between Thursday next before, and the Wednesday next after Easter-Day, shall not be reckoned or included in any rules or notices or other proceedings, except notices of trial or notices of inquiry in any of the courts of

law at Westminster;" and also to the case of *Harrison v. Heathorn and Tait*, 4 N. C. 443, 6 Scott, 283, 6 Dowl. P. C. 611.(a)

Byles, Serjt., contrà, relied on the eleventh section of the 2 W. 4, c. 39, which enacts "that, if any writ of summons, capias, or detainer, issued by authority of this act shall be served or executed on any day, whether in term or vacation, all necessary proceedings to judgment and execution may, except as hereinafter provided, be had thereon, without delay, at the expiration of eight days from the service or execution thereof, on whatever day the last of such eight days may happen to fall, whether in term or vacation: provided always, that, if the last of such eight days shall in any case happen to fall on a Sunday, Christmas-Day, or any day appointed for a public fast or thanksgiving, in either of such cases the following day shall be considered as the last of such eight days, and, if the last of such eight days shall happen to fall on any day between the Thursday before and the Wednesday after Easter-Day, then, in every such case, the Wednesday after Easter-Day shall be considered as the last of such eight days." He contended, that, according to that statute, Wednesday, the 15th, was the last day for entering an appearance, and therefore that the plaintiff's proceeding was strictly regular.

**C. Jones*, Serjt., in support of his rule. The rule of Easter term, 2 W. 4, is unaffected by the statute referred to, which was prior in point of date to the decision of this court in *Harrison v. Heathorn and Tait*. [*910]

TINDAL, C. J. The case cited was one to which the statute did not apply. In this case, however, we think the rule of court is overridden by the statute. *Leges posteriores priores contrarias abrogant.*(b) Here, the last day for entering an appearance was Wednesday, the 15th.

Rule discharged, with costs.(c)

(a) And see *Charnock v. Smith*, 3 Dowl. P. C. 607.

(b) 2 Roll. Rep. 410, 11 Co. Rep. 62 b, 63 a.

(c) As to the observance of holidays in term time, see the stat. 3 & 4 W. 4, c. 43, s. 43.

*CAPES v. JONES. May 8.

[*911]

The sheriff or inferior judge to whom a writ of trial is directed, has no authority to certify under the (late) Tower Hamlets' court of requests acts, 23 G. 2, c. 30, s. 8, and 2 W. 4, c. lxx., that there was probable or reasonable cause of action for 5l. or more.

By the seventh section of the former act it is enacted, that, if any action be brought elsewhere for a demand cognisable in the local court, and it shall appear to the judge or judges of the court where the action is brought, that the debt to be recovered does not amount to 40s., and the defendant shall duly prove, by sufficient testimony to be allowed by any judge or judges of the court where the action shall depend, that, at the time of commencing such action, the defendant was inhabiting and resident within the district, and liable to be warned or summoned before the court of requests for such debt, the said judge or judges shall not allow to the plaintiff any costs, but shall award costs to the defendant.

The eighth section provides, that, where the plaintiff shall, in any action brought in a superior court, obtain a verdict for less than 40s., if the judge or judges who shall try the cause shall

certify that there was probable or reasonable cause of action for 40s. or more, the plaintiff shall not be liable to pay costs, but shall recover his costs as if that act had not been made. The twenty-first section enacts that no action or suit for any debt not amounting to 40s., and recoverable by virtue of that act in the said court of requests, shall be brought against any person residing or inhabiting within the jurisdiction thereof, in any other court whatsoever.

An action having been brought in this court against a party liable to be sued in the local court, and the jury having, on the trial before the secondary of London, found a verdict for less than 5l.:—*Held*, that the defendant was not bound to avail himself of the prohibitory clause, by plea or by evidence at the trial, but was at liberty, notwithstanding the trial took place before a judge who had no power to certify under sect. 8, afterwards to apply to the court for leave to enter a suggestion under sect. 7.

DEBT, for goods sold and delivered, with a count upon an account stated.

Pleas, to the first count, payment, and, for the second, *nunquam indebtedus*.

At the trial before the secondary of the city of London on the 27th of February last, a verdict was returned to the plaintiff for 1l. 7s. 6d.

Dowling, Serjt., on a former day in this term, on behalf of the defendant, obtained a rule calling upon the plaintiff to show cause why he should not bring in *the record, and the defendant be at liberty to enter a suggestion thereon, pursuant to the statute 23 G. 2, c. 30, on the ground that the defendant, at the time of the commencement of the action, was residing and inhabiting within the jurisdiction of the court of requests for the Tower Hamlets, and was liable to be summoned to such court for the debt for which this action was brought, and that such debt did not amount to the sum of 40s.; and why the plaintiff should not be deprived of his costs, and pay the defendant the costs he had incurred in the defence of the action. The affidavit upon which the rule was obtained stated, that, "at the time of the accruing of the cause or causes of action in this cause, and also at the time of the commencement of this suit, the defendant as well as the plaintiff were both of them, and from thence hitherto had been and still were, resident within the limits of the court of requests for the Tower Hamlets, and that the defendant was and continued liable to be summoned or warned to the said court of requests for the Tower Hamlets; that such court of requests has jurisdiction in matters of debt to the amount of 5l.; and that the defendant should have been summoned before the commissioners of such court of requests for the Tower Hamlets, for the recovery of the said sum of 1l. 7s. 6d."

Talfourd, Serjt., now showed cause upon an affidavit which stated that the action was brought to recover 5l. 0s. 6d., which sum included charges for work and labour, as well as a sum of 2l. 15s., the price of a racing saddle which it appeared had been lent to the defendant, and not returned, both of which were, under the secondary's direction, excluded from the verdict by reason of there being no count in the declaration applicable thereto: that the plaintiff's attorney applied to the secondary for a certificate, under the provisions of the *eighth section (a)

(a) Which enacts, "that, where the plaintiff shall, upon any action brought in any of the King's courts at Westminster, or in any of the courts of Great Session of Wales, or counties

of the 23 G. 2, c. 30, (a) that the plaintiff had probable cause of action for more than 40s.; and that the secondary declined to give such certificate, conceiving he had no power so to do. The fifth section of that statute provides, "that it shall and may be lawful to and for any person or persons who now have, or hereafter shall have, any debt or debts owing unto him, her, or them, not amounting to the sum of 40s., by any person or persons whatsoever residing or inhabiting, or keeping any shop, shed, stall, or stand, or seeking a livelihood, or trading or dealing within the district therein described, or any part thereof, to cause such debtor or debtors to be warned or summoned to appear before the commissioners of the court created by that act, and that any three or more of such commissioners shall have full power and authority to adjudicate touching such debts not amounting to the sum of 40s. as they shall find to stand with equity and good conscience." The seventh section enacts, "that, if in any action of debt, or action on the case upon an assumpsit for recovery of any debt, to be sued or prosecuted against any person or persons aforesaid in any of the King's courts at Westminster, or elsewhere out of the said court of requests, and it shall appear to the judge or judges of the court where such action shall be sued or prosecuted, that the debt to be recovered by the plaintiff in such action doth not amount to the sum of 40s., and the defendant in such action shall duly prove by sufficient *tes-

timony, to be allowed by any judge or judges of the court where [914 such action shall depend, that, at the time of commencing such action, such defendant was inhabiting and resiant within the district hereinbefore described, or any part thereof, and was liable to be warned or summoned before the said court of requests for such debt, then and in such case the said judge or judges shall not allow to the said plaintiff any costs of suit, but shall award that the said plaintiff shall pay so much ordinary costs to the party defendant as such defendant shall justly prove, before the said judge or judges, it hath truly cost him in defence of the said suit." And the twenty-first section enacts "that no action or suit for any debt not amounting to the sum of 40s., and recoverable by virtue of that act in the said court of requests, shall be brought against any person residing or inhabiting within the jurisdiction thereof, in any other court whatsoever." The proper mode of taking advantage of these provisions is, by plea, or by evidence at the trial, and not by suggestion. In *Parker v. Elding*, 1 East, 352, a similar provision in the 18 G. 3, c. 36, relating to the Isle of Ely, was held to be a defence upon the general issue. So, in *Taylor v. Blair*, 3 T. R. 452, under the Westminster court of requests act, 23 G. 2, c. 17, it was held that advantage could only be taken of a similar prohibition by plea, or, possibly, by evidence at the trial. In *Barney v. Tubb*,

palatine, obtained a verdict for less than 40s., if the judge or judges who shall, by the said cause, certify that there was a probable or reasonable cause of action for 40s. or more, in every such case the plaintiff shall not be liable to pay costs, but shall recover his costs of suit, as if this act had not been made.

(a) Repealed by 9 & 10 Vict. c. 95.

2 H. Black. 351, the act—the Southwark court of requests act, 22 G. 3, c. 47—contained a provision, (s. 6,) in the precise terms of the seventh section of the act now under discussion; and it was held that the proper mode of taking advantage of it was by motion for leave to enter a suggestion. That act, however, did not, like this, contain a prohibitory clause. *915] Unless the party is bound under this act to avail himself of the *objection by plea, or by evidence at the trial, the seventh and twenty-first sections will be at variance, and the latter will repeal the former. Supposing the two sections not to be irreconcilable, the seventh must be read in conjunction with the eighth, and be held to apply only where the cause is tried before a judge competent to certify under the last-mentioned section, which the secondary or undersheriff clearly is not: *Jones v. Barnes*, 2 M. & W. 313; *Elsley v. Kirby*, 9 M. & W. 536. It would be manifestly unjust that the plaintiff should be subjected to the penalty imposed by sect. 7, merely because the court has thought fit to send the cause for trial before a judge who has no power to give him the benefit of the eighth section.

Dowling, Serjt., in support of his rule. It may be conceded, that, in all cases where the act contains a prohibitory clause, advantage must be taken of it by plea, or at all events at the trial. But there is no case to show, that, where there is another clause in the act giving a different remedy, the party is bound to avail himself of that given by the prohibitory clause. The seventh and eighth sections contemplate the trial of the cause on its merits. And there is no necessity for holding that the twenty-first section repeals the seventh; a sensible effect may be given to both; the remedy provided by them being cumulative. The construction contended for on the part of the defendant is in reality beneficial to the plaintiff; for, if the defendant were to plead the act, or to urge the objection at the trial, the plaintiff would have to pay all the costs, and must afterwards resort to the inferior court for the recovery of his demand, which he obtains without *916] doing so if the objection comes by way of suggestion. [TINDAL, C. J. *If the objection be taken by plea, the plaintiff at all events avoids the costs of the subsequent proceedings.] By the course here adopted, the plaintiff has the chance of a certificate under the eighth section. The case of *Elsley v. Kirby* shows that the secondary could not grant a certificate, under sect. 8, that there was probable or reasonable cause of action for 40s. or more. But it by no means follows, that, because the plaintiff has thought fit to carry the cause for trial before an inferior tribunal, and has thereby deprived himself of the benefit of that section, the defendant is therefore to be deprived of the advantage given to him by sect. 7. [CRESSWELL, J. Putting the twenty-first section out of consideration, and assuming the seventh and eighth to be the only clauses applicable to the case, by what medium of proof is it to be shown that the action is brought for less than 40s.? Suppose we are satisfied that the action is brought for 30s., and the judge has certified, (the cause

having been tried before a judge who has power to certify,) under sect. 8, that there was probable or reasonable cause of action for 40s. or more, we are bound by the certificate. It may be that the act is capable of this construction—that, in order to avail himself of the seventh section, the defendant must make it appear to the judge at nisi prius that the action is brought to recover less than 40s., and to the court on affidavit that he resides within the jurisdiction of, and was liable to be warned or summoned to, the inferior court. If, upon the true construction of sect. 7, the defendant is entitled to enter a suggestion, I do not see why he should be deprived of that advantage by the trial of the cause before an inferior judge. It may be that the plaintiff loses the benefit of sect. 8, by the operation of the writ of trial act.] If the plaintiff has lost an advantage by having the cause tried before a less expensive tribunal, that is his own act: he was the moving party. [*Talfourd*, Serjt. *The case of [**917 Jones v. Barnes*, 2 M. & W. 313, shows that it is the defendant's duty to urge his liability to be summoned to the court of requests, as an answer to the application for the writ of trial. TINDAL, C. J. In *Shaw v. Oates*, 4 Dowl. P. C. 720, it was held that a defendant, by consenting to a cause being tried before the sheriff, under the writ of trial act, knowing at the time that he was liable to be sued for the debt in a local court only, does not thereby waive his right to claim costs from the plaintiff, upon his recovering less than 5*l*. CRESSWELL, J. In *Bishop v. Marsh*, 6 New Cases, 12, 8 Scott, 128, 8 Dowl. P. C. 1, the point is treated as quite settled.] In *Forbes v. Simmons*, 9 Dowl. P. C. 37, likewise, it was held that an application to enter a suggestion on the roll under the Middlesex county court act, 23 G. 2, c. 33, for costs, may be made as well in a case tried before the sheriff, as in a case tried before a judge of one of the superior courts. [ERLE, J. You abandon the prohibitory clause?] The motion for a suggestion is founded solely upon the seventh section.

TINDAL, C. J. In this case there are two clauses in the act of parliament in question to be reconciled, if practicable. The twenty-first section enacts that no action or suit for any debt not amounting to the sum of 40s., and recoverable by virtue of the act in the court of requests, shall be brought against any person residing or inhabiting within the jurisdiction thereof, in any other court whatsoever. No doubt, if this prohibitory clause had stood alone, the defendant must have taken advantage of it by plea, or by evidence at the trial, or he must have been held to have waived the objection altogether. But the act also contains two other clauses, which we cannot reject, viz., the seventh *and the eighth. [**918* The seventh section enacts, “that, if in any action of debt, or action on the case upon an assumpsit for recovery of any debt, to be sued or prosecuted against any person or persons [subject to the jurisdiction] in any of the King's courts at Westminster, or elsewhere out of the said court of requests, and it shall appear to the judge or judges of the court where such action shall be sued or prosecuted, that the debt to be reco-

vered by the plaintiff in such action doth not amount to the sum of 40s., and the defendant in such action shall duly prove, by sufficient testimony, to be allowed by any judge or judges of the court where such action shall depend, that, at the time of commencing such action, such defendant was inhabiting and resiant within the district thereinbefore described, or any part thereof, and was liable to be warned or summoned before the said court of requests for such debt, then and in such case the judge or judges shall not allow to the said plaintiff any costs of suit, but shall award that the said plaintiff shall pay so much ordinary costs to the party defendant as such defendant shall justly prove before the said judge or judges it hath truly cost him in defence of the said suit." Under that section, the proper course clearly would be to move, as here, to enter a suggestion: but a difficulty is presented by sect. 8, which provides, "that, where the plaintiff shall, upon any action brought in any of the king's courts at Westminster, or in any of the courts of Great Session of Wales, or counties palatine, obtain a verdict for less than 40s., if the judge or judges who shall try the said cause shall certify that there was a probable or reasonable cause of action for 40s. or more, in every such case the plaintiff shall not be liable to pay costs, but shall recover his costs of suit, as if that act had not been made;" and the question is whether, the application of sect. 8 having become impracticable in this case, *that
 *919] of sect. 7 has not thereby become impracticable also. It has been insisted, that, inasmuch as the judge who tried the cause had no power to grant a certificate under sect. 8, the defendant is precluded from availing himself of the previous section. We find, however, that it has been distinctly decided in three cases—*Shaw v. Oates*, *Bishop v. Marsh*, and *Forbes v. Simmons*—that the right to enter a suggestion under these acts of parliament is not lost by reason of the cause being tried before a judge who has not the power of certifying. I do not see any reason for quarrelling with those decisions: nor do I conceive that the plaintiff has any cause of complaint, seeing that the carrying the cause for trial before a judge who could not grant the certificate was his own act. I therefore think the rule for entering a suggestion must be made absolute.

COLTMAN, J. It appears to me that the seventh and twenty-first sections may very well stand together. I see no reason why a defendant who loses the advantage which the twenty-first section offers him, by omitting to avail himself of it at the proper time and in the proper manner, and thereby subjecting himself to the risk of a certificate under sect. 8, is also to be deprived of the benefit of the suggestion given by sect. 7. It is true that the eighth section has become inoperative in this case, because the trial took place before a judge who had no power to grant the certificate. That may be very good ground for resisting an application by the defendant for a trial before the sheriff or other inferior judge; but it affords no answer to an application for leave to enter a suggestion.

CRESSWELL, J. I am entirely of the same opinion. The act of parlia-

ment gives two distinct remedies to a defendant who is improperly sued in a superior court *for a debt recoverable in the inferior jurisdiction, one of which he must avail himself of by plea or by evidence [*920 at the trial, the other by motion to enter a suggestion. At first I was inclined to think, that, as the trial took place before a judge who has by law no power to grant a certificate such as that provided for by sect. 8, and as the seventh and eighth sections were evidently intended to be read together, the remedy given to the defendant by sect. 7 was gone. But, upon consideration, I am of opinion that the true answer has been given, viz., that the plaintiff has voluntarily relinquished the advantage held out to him by sect. 8, by electing to have the cause heard before a tribunal, the presiding officer of which has no power to certify. If he had wished to reserve to himself the chance of obtaining a certificate, he should have abstained from applying for an order for a writ of trial; or, if the application were made by the defendant, he should have urged that as a ground of objection to the making of the order, and then the judge, in all probability, would have compelled the defendant to consent that the secondary should have power to certify.

ERLE, J. The authorities are distinct that a suggestion may be entered, though the cause is tried before a sheriff or other inferior judge. And I cannot agree that the seventh section of this act is rendered nugatory by the cumulative remedy provided by the twenty-first section.

Much injustice often results from the absence of authority in the under sheriff or the secondary, to grant these certificates.

Rule absolute.

*HODGES, a Pauper, v. TOPLIS and Another. May 8. [*921

A. suing in *formâ pauperis*, neglects to proceed to trial pursuant to notice, the defendant is entitled to the costs of the day, under the rule of H. 2 W. 4, r. 110, but not to dispauper A. Notice of trial having been given and the cause entered, A.'s attorney's clerk was, by a blunder in issuing the jury process, prevented from passing the record in due time. The court ordered A. to pay the costs of the day.

THE plaintiff who had, *pendente lite*, obtained an order to sue in *formâ pauperis*, delivered the issue on the 24th of January last, with notice of trial for the sittings after Hilary term, and set the cause down for trial; but he omitted to enter the record; in consequence of which, the cause could not be tried.

Channell, Serjt., on a former day in this term, moved for a rule calling upon the plaintiff to show cause why he should not pay the costs of the day, and why he should not be dispaupered. The motion was founded upon an affidavit from which it appeared that the excuse made by the plaintiff's attorney for not having lodged the record in due time, was, that he had intrusted the management of the cause to a clerk, who had

got drunk, and absented himself from the office upon the day on which he should have entered the record. The learned serjeant submitted that enough was shown to entitle him to a rule in the form prayed, though no personal misconduct was imputed to the pauper himself. He referred to *Doe d. Leppingwell v. Trussell*, 6 East, 505; (a) *Facer v. French*, 5 Dowl. P. C. 554, and *Pratt v. Delarue*, 10 M. & W. 509.

TINDAL, C. J. The rule may go upon the first point. But, as to the other, there seems to me to be no ground for it. The omission to enter the record at the proper time appears to have been the result of the drunkenness *and misconduct of the attorney's clerk, which can be no
*922] reason for dispaupering the client.

Dowling, Serjt., now showed cause, upon an affidavit of the plaintiff's attorney's clerk, denying the alleged drunkenness, and stating as an excuse for not having duly lodged the record, that he had, in issuing the jury process, inadvertently filled up a *distringas* instead of a *habeas corpora*, and that, in consequence of the delay caused in rectifying this blunder, the sheriff's office was closed before he had time to obtain the jury panel to annex to the record. The application is founded upon the 110th rule of Hilary term, 2 W. 4, which provides, that, "where a pauper omits to proceed to trial pursuant to notice or an undertaking, he may be called upon, by a rule to show cause why he should not pay costs, though he has not been dispaupered." The meaning of that rule is,—not that a pauper omitting to proceed to trial pursuant to notice, shall, in all cases, pay costs, but that the circumstance of his being admitted to sue *in formâ pauperis* shall not excuse him from the payment of costs, if he has been guilty of any misconduct. Here, it cannot be imputed to the plaintiff that he has been guilty of any vexatious or improper conduct: the omission to try the cause was the result of a mere accidental blunder of the clerk, for which the plaintiff ought not in this way to be made responsible.

Channell, Serjt., in support of the rule. Before the rule of Hilary term, 2 W. 4, a defendant had no remedy against a pauper plaintiff, for the expense he was put to by a default of this sort: but now a pauper stands in the same position with regard to costs of the day for not proceeding to trial, as any other plaintiff. [CRESSWELL, J. If that be so, why is not the rule absolute in the first instance?] At all events, the defendant is
*923] *entitled to his costs, as he would have been if sued by any other person, unless a satisfactory excuse for not proceeding to trial pursuant to the notice, is shown by the plaintiff. [TINDAL, C. J. The pauper does not appear to have been guilty of any personal misconduct.] To render him liable to costs, it is not necessary that he should be personally guilty of vexatious conduct. He is responsible for the miscarriage of his attorney, and has a remedy against him for any injury that may result to him from his negligence. In *Doe d. Lindsey v. Edwards*, 2 Dowl. P. C. 471, it was held, that, if a pauper withdraws his record

(a) S. C. differently reported, 2 Smith, 676.

because he is not prepared with a certain necessary document at the assizes, the court will compel him to pay the costs of the day. And PARKE, B., said: "The pauper ought to have been prepared to try at the assizes for which he had given notice. He has the advantage of counsel and attorney for nothing, and no fees to pay. It is exceedingly hard on the other side to be compelled to appear at the assizes, in pursuance of a notice of trial from the pauper, and then, when the time arrives, the record is withdrawn. I think sufficient excuse has not been given by the pauper for not proceeding to trial; and therefore he ought to pay the costs of the day." So, in *Gore v. Morpew*, 8 Dowl. P. C. 137, COLERIDGE, J., says: "There is a great hardship on parties who are sued by paupers; and I think that, notwithstanding the doubt which arises on the terms of the rule of court, this rule (a) must be made absolute. In the case of *Weston v. Withers*, 2 T. R. 511, the court adopted a similar course, of compelling a pauper to pay costs." Undoubtedly it is in the discretion of the court to grant or to withhold the costs; but these cases show *the principle [*924 upon which such discretion is to be exercised.

TINDAL, C. J. I think the default in this case is one that ought to subject the plaintiff to the costs of the day. The defendant, having received notice of trial, necessarily incurs great expense in preparing for his defence; and then the plaintiff's attorney, having delayed setting down the cause till the latest moment, is in such a hurry at last as to fall into a gross blunder, which he has no time to rectify.

The rest of the court concurred.

Rule absolute, with costs.

(a) For payment by the plaintiff of the costs of the day.

JEFFERIES v. YABLONSKI. May 8.

In C. P. the signature of counsel to the pleadings need not appear in the issue delivered. An issue in a cause to be tried before the sheriff pursuant to the statute 3 & 4 W. 4, c. 42, s. 17, delivered with a blank for the *teste* of the writ of trial, is defective. The defendant should apply to a judge at chambers to amend the issue at the plaintiff's expense. It is no ground of objection, that a blank is left for the *return* of the writ of trial.

THIS was an action of debt, brought to recover 7*l.* 13*s.* 4*d.* for the board, maintenance, and education of the defendant's son, and for clothes and other necessaries provided for him by the plaintiff at the defendant's request; with a count upon an account stated. Pleas, *nunquam indebitatus*, and a set-off for goods sold and delivered, &c. The plaintiff replied, denying the set-off. An order having been obtained for the trial of the cause before the sheriff of Warwickshire, the issue was delivered to the defendant's attorney on the 2d of May, with notice of trial for the 20th.

The pleas were duly signed by a serjeant; but the serjeant's name did not appear in the issue delivered. *A blank was also left therein for the teste of the writ of trial.

Dowling, Serjt., on a former day in this term, obtained a rule nisi to set aside the issue and notice of trial, (a) for irregularity, with costs, on the ground that it was not delivered in compliance with the form given by the rule of court of Hilary term, 4 W. 4, No. 4, the signature of counsel to the pleas being wanting in the issue delivered, and the teste of the writ of trial being omitted.

Byles, Serjt., showed cause. The first objection is groundless: it is enough, in this court at least, that the pleas are properly authenticated by the signature of counsel at the time they are delivered; the rule of the court of King's Bench, of Easter term, 18 Car. 2, (b) which required the counsel's name to be inserted in all copies of the pleadings, never was adopted here. And the omission of the teste of the writ of trial arises from the fact of the issue having been delivered before the suing out of the writ of trial according to the almost universal practice, and the teste and return being therefore necessarily left in blank. At all events, assuming this to be an irregularity, the proper course was to apply to the court to have it amended at the plaintiff's expense; as was done in *Hart v. Dally*, 2 Dowl. P. C. 257, and *Ikin v. Plevin*, 5 Dowl. P. C. 594.

**Dowling*, Serjt., in support of the rule. The issue must contain a true and correct transcript of the proceedings; and this it cannot be, if it omits any thing that is material to the validity of the pleas. The rule is thus laid down in Archbold's Practice, 8th edit., by Chitty, p. 281: "The declaration and pleadings must be correctly copied in the issue, each forming a separate paragraph; and under the special pleas, &c., the names of the counsel by whom they are signed should be inserted." This is the settled practice. [CRESSWELL, J. Could the defendant take advantage of the want of counsel's signature to a plea, after he had replied to it?] Probably his replication would preclude him from taking the objection. The issue is, at all events, defective for not containing the date of the teste of the writ of trial. In *Peel v. Ward*, 5 Dowl. P. C. 169, it was distinctly held, that, where a cause is directed to be tried before the sheriff, the issue must be framed in accordance with the form given by the rule of Hilary term, 4 W. 4, No. 4. [TINDAL, C. J. The cases serve to show that the proper course for the defendant to pursue, is, to apply to a judge at chambers to amend the issue at the plaintiff's

(a) But see *Dennett v. Hardy*, 2 D. & L. 488.

(b) That rule provided that "the clerks of the papers of this court, (King's Bench,) in all copies of pleadings and paper-books by them made, shall write under such copies of pleadings and paper-books the names of the counsel who signed such pleadings, as well on the part of the plaintiff as on the part of the defendant; and that, in all books to be delivered to the justices of this court, the names of the counsel who shall sign those pleadings, as well on the part of the plaintiff as on the part of the defendant, shall be subscribed in those books by the clerks or attorneys who deliver the same."

expense: *Hart v. Dally*; *Ikin v. Plevin*.] *Dennett v. Hardy*, 2 D. & L. 484, shows that the party may come to the court. [CRESSWELL, J. In *Watts v. Ball*, 1 M. & Gr. 208, 1 Scott, N. R. 173, a defect of this sort was made the ground of a motion to amend the issue.] In *Lycett* (or *Blissett*) v. *Tenant*, 4 N. C. 168, 5 Scott, 479, Arn. 6, in the issue delivered to the defendant, the date of the writ of summons was omitted; in the writ of trial this defect was supplied; on the cause being called on for trial, the defendant objected that this variance was fatal; but the under-sheriff, thinking himself bound by the writ of trial, decided that the cause must proceed: *the defendant *under protest* defended, and the plaintiff obtained a verdict: the court set aside the writ of trial, holding that the objection was saved by the protest. [TINDAL, C. J. That is a totally different case: there the plaintiff had delivered an issue differing in a material particular from the writ of trial: here, the objection is merely that a blank is left for the teste of the writ of trial, which, it seems, perhaps improperly, is seldom or never issued until just before the day of trial.] Whatever the practice may be, this issue is not a due compliance with the rule of court.

TINDAL, C. J. The first objection to the issue delivered, is, that the name of a serjeant, who signed the pleas, is not inserted therein. It does not appear to me to be necessary that it should be so inserted. In the form No. 1, in the rule of Hilary term, 4 W. 4, the direction after the recital of the writ is as follows: "Copy the declaration from these words [For that] to the end, and the plea and subsequent pleadings to the joinder of issue." It is entirely silent as to the name of the serjeant or counsel. And, as it was required by an old rule of court in the King's Bench, that the name of the counsel signing the pleadings should be inserted in all copies thereof, in the absence of any such requirement in the rule of court under consideration, I think we are justified in saying that the omission of the signature in the issue delivered, is no valid ground of objection. The whole object of requiring the signature of counsel is attained by its being attached to the pleadings when first delivered. With regard, however, to the objection that the teste of the writ of trial does not appear in the issue, I cannot but say that it seems to me to be well founded. The form No. 4 in the rule of Hilary term, 4 W. 4, does, in terms, direct the first blank to be filled up with the teste of the writ of trial. The *leaving a blank for the return-day does not appear to be open to the same objection, inasmuch as it is necessarily uncertain when the trial may take place. There being, then, a clear defect in the issue, the question is, how is this rule to be disposed of? My brother *Dowling*, in asking that the issue and notice of trial may be set aside, and with costs, has asked too much. The defendant should have taken the course pointed out in some of the cases that have been referred to, viz., calling on the plaintiff by summons to amend the issue at his own expense. The just course, therefore, seems to me to be, to discharge this rule without costs; the plaintiff

amending the issue by inserting the teste of the writ of trial, and paying the costs of such amendment.

COLTMAN, J. There clearly is no ground for the first objection. With regard to the second, it does appear that the rule of court referred to, requires that the teste of the writ of trial should be inserted in the issue delivered. The plaintiff can have no practical difficulty in ascertaining this date. Although my brother PATTESON seems to have expressed an obiter opinion upon the point, in *Dennett v. Hardy*, there appears to be no case in which this has been expressly decided. I therefore think the defendant ought not to be visited with the costs of this rule. But, inasmuch as the defendant might have returned the issue, or compelled the plaintiff to amend it, by applying to a judge at chambers, it seems to me that justice will be best attained by adopting the course suggested by the lord chief justice.

CRESSWELL, J. I also think this should be treated as a defective, rather than as an irregular, issue; and that the course suggested will meet the justice of the case.

*929] *ERLE, J. The rule in question provides that "issues, judgments, and other proceedings in actions commenced by process under 2 W. 4, c. 39, shall be in the several forms in the schedule thereunto annexed, or to the like effect, *mutatis mutandis*; provided, that, in case of non-compliance, the court or a judge may give leave to amend." When that rule was framed, the judges evidently foresaw the evil that would arise from allowing any trifling defect in the issue delivered, to invalidate the proceeding. This seems to be peculiarly one of those defects which that proviso was intended to meet.

Rule accordingly.

STROUD v. WATTS. May 8.

Upon the execution of a writ of inquiry directed to the sheriff in an action for a malicious prosecution, in which the damages are under 40s., a certificate under the statute 3 & 4 W. 4, c. 24, s. 2, to entitle the plaintiff to costs, should be signed by the under-sheriff in the name of the sheriff, and not in his own name.

CASE for a malicious prosecution for felony. The defendant suffered judgment by default; and, upon a writ of inquiry before the under-sheriff of the county of Wilts, the jury returned a verdict for the plaintiff, damages *one guinea*. The under-sheriff thereupon granted a certificate under the statute 3 & 4 Vict. c. 24, s. 2, (a) *930] "that the grievance within complained of was wilful and malicious," so as to entitle the

(a) Which enacts, "that, if the plaintiff in any action of trespass, or of trespass on the case, brought, or to be brought, in any of her majesty's courts at Westminster, or in the court of Common Pleas at Lancaster, or Durham, shall recover, by the verdict of a jury, less damages than 40s., such plaintiff shall not be entitled to recover or obtain from the defendant in respect

plaintiff to costs. The certificate was signed by the under-sheriff in the name of "Jacob Pleydell Bouverie, Esq., commonly called Viscount Folkestone, sheriff," to whom the writ was directed; and the return was similarly signed.

The costs having been taxed, and paid under protest,

Byles, Serjt., on a former day in this term, moved for a rule calling on the plaintiff to show cause why the certificate, final judgment, and allocatur should not be set aside, and why the master should not be at liberty to review his taxation, on the ground that the certificate purported to be signed by a person before whom the cause was not tried. [CRESSWELL, J. I think this point arose a short time since upon an indictment for perjury before a legal assessor. *Granger*, *amicus curiæ*, stated that the case alluded to was *The Queen v. Dunn*, 1 Car. & K. 730, tried before WIGHTMAN, J., at the summer assizes at Durham, in 1843, and afterwards argued before the judges upon a point reserved.(a) The perjury was proved to have been committed upon the execution of a writ of trial directed to the sheriff of Durham, the trial having taken place before Mr. Stapylton, the sheriff's assessor, neither the sheriff nor the under-sheriff being present. The indictment alleged the trial to have taken place before the sheriff; and the majority of the judges held that there was no variance.] Here, the presiding officer was the under-sheriff, and not the high sheriff. [CRESSWELL, J. "Presiding officer," in the statute, means the officer presiding in his own right.] The 18th section of the 3 & 4 W. 4, c. 42, makes a distinction between the sheriff and the deputy or judge before whom a writ of inquiry is executed or a trial had.

*A rule nisi having been granted,

[*931

Sir *T. Wilde*, Serjt., now showed cause. The writ of inquiry is directed to the high sheriff; and, though in point of fact, it is executed before the under-sheriff, in legal intendment the writ is executed before the high sheriff, and the return is made by him. Every official act done, by the under-sheriff, is done in the name of the sheriff. If this certificate had been signed in the name of the person who *actually* presided at the inquiry, the record would have presented an incongruity. The court can only deal with the officer to whom the writ is directed, and who, in point of law, is supposed to preside at its execution. [CRESSWELL, J. The case of *The Queen v. Dunn* is very much in point. In Comyns's Digest, tit. *Viscount*, the sheriff seems to be assumed to be the only person recognised by the court, though the under-sheriff appears to have been an officer well known.] In Bacon's Abridgment, tit. *Sheriff*, (H.), it is said, that "the

of such verdict, any costs whatever,—whether it shall be given upon any issue or issues tried, or judgment shall have passed by default,—unless the judge or presiding officer before whom such verdict shall be obtained, shall immediately afterwards certify on the back of the record, or on the writ of trial or writ of inquiry, that the action was really brought to try a right besides the mere right to recover damages for the trespass or grievance for which the action shall have been brought, or that the trespass or grievance in respect of which the action was brought was wilful and malicious."

(a) 2 Moody, C. C. 297.

high sheriff may execute the office himself; and the under-sheriff hath not, nor ought to have, any estate or interest in the office itself; *neither may he do any thing in his own name, but only in the name of the high sheriff, who is answerable for him.*" The certificate, therefore, is clearly sufficient to warrant the taxation.

Byles, Serjt., in support of the rule. The statute 3 & 4 Vict. c. 24, s. 2, requires the certificate to be given by the judge who actually presides at the trial, and who alone has the means of judging whether or not a certificate ought to be granted. And the latter part of the eighteenth section of the 3 & 4 W. 4, c. 42, shows that the legislature draws a distinction between the sheriff or his deputy and the judge presiding at the trial of an issue. [CRESSWELL, J. This is a writ of inquiry.] There would be no *932] more incongruity in a *certificate under this act being signed by the under-sheriff, than in a similar certificate being signed by a puisne judge; for the jury process in all cases runs in the name of the lord chief justice. The case of *The Queen v. Dunn* is distinguishable; for, there the party could not be permitted to aver any thing against the record. [CRESSWELL, J. The decision in that case did not proceed on the ground of estoppel; but upon the ground that there was no variance. Here, there is a record showing the sheriff to be the judge. The very foundation of the motion is a contradiction of the record. The defendant has no *locus standi* until he falsifies the record.] The certificate is no part of the record.

TINDAL, C. J. I am of opinion that the certificate in this case is sufficient, and, therefore, that this rule must be discharged. That the inquiry is properly returned in the name of the sheriff, is clear from Plowden, 63, (a) where it is said—"And always when the writ is returned, the name and surname of the sheriff ought to be put to the return; and so he ought to have done here, for, there is a common diversity holden at moots in court and Chancery, that the writ shall be directed to the sheriff of such a county generally, without naming his name, but he ought to put his name to the return:" and this is required by the statute 12 E. 2, c. 5, which directs, "that, from henceforth, sheriffs and other bailiffs that receive the king's writs returnable in his court, shall put their own names with the returns, so that the court may know of whom they took such returns, if need be." The writ being directed to the sheriff by name, and being necessarily returned in his name, I see no reason why an intermediate proceeding like this should appear to be authenticated by the *933] name *of a third person, altogether a stranger to the record. A certificate in the name of the under-sheriff would, I incline to think, e altogether without warrant.

As this is a motion of a speculative character, I think the rule should be discharged with costs.

(a) Plowd. 63 a, *arguendo*.

The rest of the court concurred.

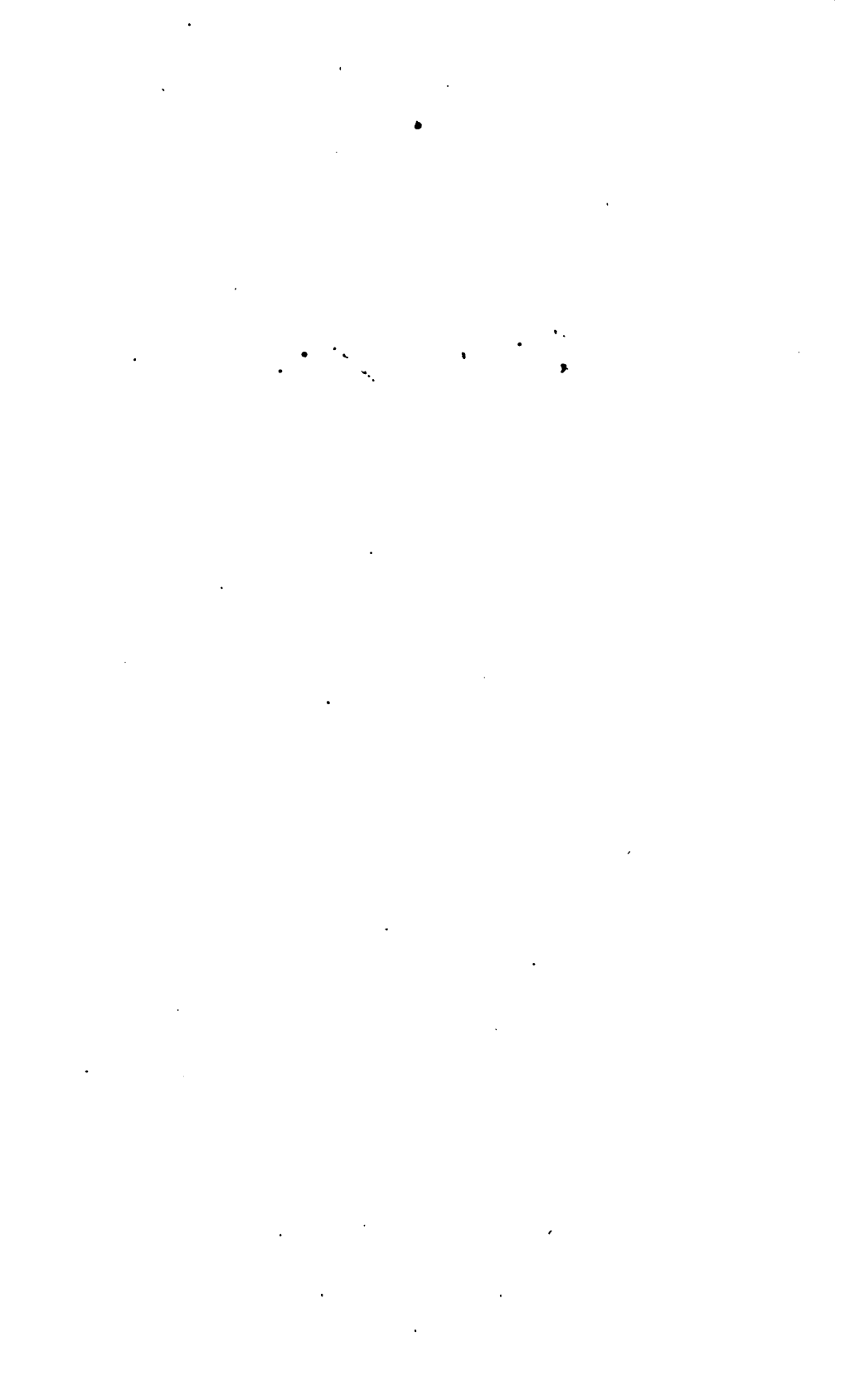
Rule discharged with costs. (a)

(a) In the *Abbot of Tavestocke v. Stourton*, P. 21 H. 6, fo. 34, pl. 22, the writ of *justicies*, in debt for 1000*l.*, was directed to the sheriff of Devon. The plea was held in the absence of W. Beauchamp, the sheriff, before one Robert, his under-sheriff, although the sheriff's books stated that the plea was held before Beauchamp, the sheriff. The defendant pleaded in the county court that he was brought to answer *coram non judice*. To this plea the abbot demurred, and had judgment in the county court. Stourton brought a writ of false judgment, which was non-prossed. He afterwards brought a second writ of false judgment, and assigned errors. The abbot, without answering the errors assigned, relied on the judgment of non-pros; and it was held that the judgment of non-pros, being after appearance and process, was peremptory. Vide S. C. Bro. Abr., tit. *Faux Judgment*, pl. 9.

In an anonymous case in this court, 29 Eliz. 2 Leon. 34, "A *justicies* issued forth to the sheriff of H. for the debt of 40*l.*: and the same plea was held before the under-sheriff in the absence of the sheriff. It was moved by *Puckering*, Serjt., if a writ of error or a false judgment lieth in this case. And it was resolved by the justices that the sheriff himself, in his person, ought to hold plea of a *justicies*."

Upon a *justicies*, the sheriff cannot make his precept to the bailiff of a franchise. T. 34 H. 6, fo. 48, pl. 13.

END OF EASTER TERM.



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TO

REGISTRATION CASES.

Willis

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1. A conveyance from one vendor to several persons, who purchase with the intention of obtaining and multiplying votes by splitting and dividing the interest, the vendor not being cognisant of such purpose, is valid. Nor is such conveyance brought within the 7 & 8 W. 3, c. 25, s. 7, by the mere knowledge, on the part of the vendor's solicitor or agent, of the object of the purchasers. *Hoyland, App., Bremner, Resp.*

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2. A conveyance made to carry into effect a real *bonâ fide* contract of sale, where the purchase-money is paid, and the possession taken, without any secret reservation or trust whatever for the benefit of the vendor, is not within the 7 & 8 W. 3, c. 25, s. 7, notwithstanding it is made with a view to the multiplying of voices or the splitting of freeholds; the intention of the statute being, to avoid such conveyances only, made with that view, as are in themselves fraudulent and collusive. *Riley, App., Crossley, Resp.*

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3. A conveyance of land by one vendor to several vendees for a *bonâ fide* consideration, is valid, although the avowed object of the vendor be to multiply, and that of the vendees to acquire, the right of voting. *Alexander, App., Newman, Resp.*

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4. A conveyance made for a *bonâ fide* consideration, in trust, as to one-tenth, for the grantor himself, and, as to the other nine-tenths, for certain other parties who amongst themselves contributed nine-tenths of the purchase-money, is not within the 7 & 8 W. 3, c. 25, s. 7, notwithstanding the avowed object of the grantor is to multiply, and of the other parties to acquire, the right of voting. *Thorniley, App., Aspland, Resp.*

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5. A deed of gift *bonâ fide* executed by a father to his sons, expressed to be in consideration of natural love and affection, is not within the 7 & 8 W. 3, c. 25, s. 7, although the avowed object of the father was to confer votes upon his sons. *Newton, App., Hargreaves, Resp.*

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6. A *bonâ fide* grant of a rent-charge by a father to his sons, expressed to be made in consideration of natural love and affection, is not within the 7 & 8 W. 3, c. 25, s. 7, though the intention of the grantor be to create a vote. *Newton, App., Mobberley, Resp.*

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7. Whether or not there is fraud in the making of a grant, is a question of fact, which must, in all cases, be decided by the revising barrister: the court will not infer fraud. *Ibid.*

8. A *bonâ fide* grant of a rent-charge by a man to his son and his son-in-law, expressed to be made for a nominal consideration only, is not within the 7 & 8 W. 3, c. 25, s. 7, though all of the parties contemplated the creation of votes. *Newton, App., Overseers of Crowley, Resp.*

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ii. *Shrewsbury Hospital Acts*, 11 G. 1, c. xxxiii, 10 G. 3, c. lviii, and 4 G. 4, c. 28. (*Private.*)

1. The inmates of an hospital in the county of York, founded and endowed by the Duke of N. in 1673, claimed to be registered for the county of Nottingham.

It appeared that the revenues of the hospital were derived from lands, and corn-rents in lieu of tithes of lands, in Yorkshire and Nottinghamshire, which were vested in trustees; that the whole formed one fund, out of which the trustees paid a weekly stipend to each inmate; that, originally, each inmate received 2s. 6d. a week, and a certain yearly allowance of coals and clothing; but that the weekly payment had subsequently been increased to 10s.; that, by one of the constitutions of the charity, it was provided, that, if at the end of any year there should be found in the treasury of the hospital above 100*l.*, the surplus should be divided amongst the pensioners;

and that the appointment was for life, no instance of dismissal being known.

By an act of parliament modifying the constitutions of the charity, it was provided, that, instead of having the surplus revenues distributable amongst the original number of pensioners, additional pensioners should be chosen; and the trustees, under the direction of the duke, were empowered and directed, from time to time, to add as many more pensioners as the revenues of the hospital would allow (leaving a sufficient surplus for repairs and incidental expenses); and the trustees were, under the direction of the duke, to pay the pensioners *such fixed stipends as they should think fit*, (having regard to the revenues of the hospital,) *and to lessen or increase, vary, change, and alter such weekly stipends, as they should find requisite, so that the stipends should at no time be reduced below 3s. 6d. a week.*

The revising barrister having held that the inmates had no legal or equitable interest in the funds of the hospital to a sufficient amount to entitle them to be registered, assuming that they had no absolute right to more than 3s. 6d. per week, the court affirmed his decision. *Ashmore, App., Lees, Resp.* Page 31

2. And held, that the rents derived from the lands in the two counties might be apporportioned. *Ibid.*

II. CASES DECIDED UPON THE CONSTRUCTION OF THE RIFORM ACT, 2 W. 4, c. 45.

Section 26.]—1. The words "actual possession," in the 2 W. 4, c. 45, s. 26, mean possession *in fact*, as contradistinguished from a possession *in law*. *Murray, App., Thorniley, Resp.* 217

2. Therefore, a grantee of a rent-charge is not entitled to be registered, unless he has been in the *actual* receipt of it for six months before the last day of July. 217

Section 27.]—3. A. was rated as the occupier of a house No. 3 Golden Lane, but by mistake inaccurately described as No. 4: the rates were paid, under an agreement, by the landlord; and A. had paid all his rent:—

Seemle, that this is not an "inaccurate description of the premises," within the 6 & 7 Vict. c. 18, s. 75, and that the rating of A. was sufficient within the 2 W. 4, c. 45, s. 27. *Cook, App., Luckett, Resp.* 168

4. In consequence of a claim made by A., an occupying tenant, his name was inserted in a rate, immediately after that of his landlord, who was duly rated in respect of the same premises. All the columns opposite A.'s name were left blank, and it was no otherwise connected with that of his landlord than by its juxtaposition:—

Held, that A. was sufficiently rated. *Pariente App., Luckett, Resp.* 177

5. And held that the revising barrister ought not to have been influenced by a statement of one of the overseers, that A.'s name was so inserted without any intention to rate him; but should have decided upon the construction of the rate *per se*, irrespectively of any extraneous evidence. Page 177

6. "The clear yearly value" of premises, under the 2 W. 4, c. 45, s. 27, is matter of fact, to be determined by the revising barrister upon the evidence before him. *Cogan, App., Luckett, Resp.* 182

7. The proper criterion of value seems to be, the amount for which the premises would fairly let, the tenant bearing the ordinary burdens incident to the occupation. *Ibid.*

8. Six persons were joint lessees of a house, which they and others used for the purposes of a political association. The rent, and the wages of the servants who had charge of the premises, were paid out of a common fund, to which the lessees and the other members of the association were subscribers. Various members of the association transacted the business of the association upon the premises; and the lessees, when in London, frequented the premises, partly transacting the business of the association, and partly transacting their own affairs.

The revising barrister having decided, upon these facts, that the lessees occupied the premises as tenants within the 2 W. 4, c. 45, s. 27, and that the same were not jointly occupied by them and the other members of the association as tenants:—The court affirmed his decision. *Luckett, App., Bright, Resp.* 193

9. "Part of a house," is a sufficient statement of the qualification of a borough voter, under the 2 W. 4, c. 45, s. 27. *Judson, App., Luckett, Resp.* 197

10. The proper criterion of "clear yearly value," within the 2 W. 4, c. 45, s. 27, is, the fair annual *rent*, without making any deduction on account of repairs or insurance. *Colvill, App., Wood, Resp.* 210

Section 30.]—11. A. claimed, under the 2 W. 4, c. 45, s. 30, to be rated in respect of premises occupied by him, and asked the overseer whether there were any rates due; the overseer saying that he did not know, A. added, "If there are, I am prepared to pay them," but he did not produce or offer money: the overseer answered, "I'll see to it," and A. went away, and made no further inquiry on the subject:—*Held*, not a sufficient tender to entitle A. to the benefit of that section. *Bishop, App., Smedley, Resp.* 90

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13. A rate was made on the 28th of September, 1844, and purported to be made "for

thirteen weeks, from the 16th of September to the 16th of December." A new rate was made on the 23d of December, 1844, allowed on the 3d of January, 1845, and published on the 5th:—*Held*, that a claim, under the 2 W. 4, c. 45, s. 30, made on the 27th of December, to be put upon "the rate for the time being," was a claim to be put on the rate made in September. *Dushell, App., Luckett, Resp.* Page 111

Section 32.]—14. Freemen and liverymen of London admitted freemen by purchase since the 1st of March, 1831, are entitled to be registered, notwithstanding the proviso in the 2 W. 4, c. 45, s. 32; such proviso applying not to liverymen of the city of London, but to freemen and burgesses of other cities and boroughs. *Croucher, App., Browne, Resp.* 97

III. CASES DECIDED UPON THE CONSTRUCTION OF THE REGISTRATION ACT, 6 & 7 Vict. c. 18.

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Section 5.]—2. In a list of voters for a county, a voter was described in the column headed "Place of abode," as "travelling abroad:"—*Held*, a sufficient description. *Walker, App., Payne, Resp.* 12

3. A party whose name appeared on the register for a county, was objected to, on the ground that the property was not sufficiently described therein for the purpose of being identified. The barrister having decided that the description was sufficient, the court declined to interfere. *Wood, App., The Overseers of Willeston, Resp.* 15

4. An objection to the sufficiency of the description of a voter's place of abode, described as "The Grove, Neasdon, in this parish," Neasdon being in the parish mentioned in the heading of that part of the register, was abandoned. 15

Section 7.]—5. In a notice of objection, the objector described himself as of "No. 398 High street, Cheltenham, on the register of voters for the parish of Cirencester." On the register so referred to, the objector was described as of "Cheltenham" only:—*Held*, that the notice was sufficient. *Pruen, App., Cox, Resp.* 1

Section 15.]—6. In a notice of claim to be inserted in a list of voters for a city or borough, pursuant to the 6 & 7 Vict. c. 18, s. 15, sched. (B.) No. 6, it is enough to describe the nature of the qualification in the third column of the form, as "house," notwithstanding the qualification in reality consists in the occupation of two houses in

immediate succession, provided the whole qualification be accurately described in the fourth column. *Hitchins, App., Brown, Resp.* Page 25

7. Where a voter's qualification appears in the list to consist of a successive occupation of houses, the number of each, if each has a number, must be stated. *Flounders, App., Donner, Resp.* 63

Section 17.]—8. A notice of objection delivered to the overseers, under the 6 & 7 Vict. c. 18, s. 17, sched. (B.) No. 10, where there are more lists than one made out by the overseers, must specify the particular list to which the objection refers. *Barton, App., Ashley, Resp.* 4

9. A notice of objection pursuant to the 6 & 7 Vict. c. 18, s. 17, sched. (B.) Nos. 10, 11, signed by the objector, with the addition of his true place of abode, is sufficient, notwithstanding it differs from that erroneously placed against his name in the list of voters. *Per Tindal, C. J., and Colman and Erle, Js., dissentiente Maule, J. Knowles, App., Brooking, Resp.* 226

10. A notice of objection sent by post, so that it would, in the ordinary course of the post, be delivered on a Sunday, is nevertheless well served. *Colvill, App., Lewis, Resp.* 60

11. C. A. on the list of voters for the parish of Fisherton Anger, was described in the list as residing in "Fisherton Street;" in a notice of objection he described himself as "C. A., of the parish of Fisherton Anger, on the list of voters for the said parish of Fisherton Anger;" there was no other person of that name upon the list of voters for Fisherton Anger:—*Held*, that the notice was sufficient. *Wills, App., Adey, Resp.* 246

Section 40.]—12. Where a voter's qualification appears in the list to consist of a successive occupation of houses, the numbers of each, if each has a number, must be stated. And, *semble, per Erle, J.*, that, if the omission of the number be supplied to the revising barrister, pending the revision, he is bound to amend the description, under this section. *Flounders, App., Donner, Resp.* 63

13. *Held*, that, where a voter's place of abode is untruly stated in the list, the barrister has power to insert it correctly, under the 6 & 7 Vict. c. 18, s. 40. 187

14. And *semble, per Maule, J.*, that the place of abode is no part of the qualification. *Ibid.*

Sections 62, 64.]—15. *Semble*, that, where the respondent appears, he is precluded from objecting to the form of the service of the notice of appeal required by ss. 62, 64. *Rawlins, App., The Overseers of West Derby, Resp.* 72

16. The court cannot entertain an appeal in the absence of the respondent, unless there be an affidavit of service upon him of notice of the appellant's intention to prosecute the appeal, under the 6 & 7 Vict. c. 18, s. 64. *Colvill, App., Lewis, Resp.* Page 60
17. A waiver by the respondent of the notice to him required by the 6 & 7 Vict. c. 18, s. 64, will not entitle the court to entertain the appeal in his absence. *Newton, App., Overseers of Mobberley, Respp.* 203
- Section 75.]—18. A. was rated as the occupier of a house, No. 3, Golden Lane; but, by mistake, inaccurately described as No. 4: the rates were paid, under an agreement, by the landlord; and A. had paid all his rent:—*Seem*, that this was not "an inaccurate description of the premises," within the 6 & 7 Vict. c. 18, s. 75; but a sufficient rating of A. within the 2 W. 4, c. 45, s. 27. And that the insertion of A. in the rate was a *bonâ fide* calling upon him to pay, and the payment by the landlord a *bonâ fide* payment by A., within the former statute. *Cook, App., Luckett, Resp.* 168
19. In consequence of a claim made by A., an occupying tenant, his name was inserted in a rate, immediately after that of his landlord, who was duly rated in respect of the same premises. All the columns opposite A.'s name were left blank, and it was no otherwise connected with that of his landlord than by its juxta-position:—*Held*, that A. was sufficiently rated. *Judson, App., Luckett, Resp.* 197
- Sections 100, 101.]—20. Sending a notice of objection to the party objected to, by the post, pursuant to the directions of the 6 & 7 Vict. c. 18, s. 100, is a sufficient substitute for giving the notice to the party, or leaving it at his place of abode, as required by s. 7. *Bishop, App., Helps, Resp.* 45
21. Where, therefore, a notice was posted, under s. 100, in sufficient time to reach the party, according to the ordinary course of post, on the 25th of August:—*Held*, that such service was sufficient, notwithstanding that the actual delivery was accidentally delayed until the 27th. 45
22. And, *held*, that the provisions of s. 100 are equally applicable to notices to overseers, directed to their usual places of abode, as provided by s. 101. *Hickton, App., Antrobus, Resp.* 82
23. The production of a stamped duplicate notice of claim, duly delivered to the post-

master, and duly directed to the overseers pursuant to the 6 & 7 Vict. c. 18, ss. 100, 101, is sufficient evidence of the notice of claim having been given to the overseers at the place mentioned in such duplicate, on the day on which such notice would, in the ordinary course of post, have been delivered at such place—notwithstanding its actual delivery to the overseer is delayed until after the time limited by the act, in consequence of pressure of business at the post-office. *Bayley, App., The Overseers of Nantwich, Respp.* Page 118

IV. PRACTICE AND COURSE OF PROCEEDING UPON REGISTRATION APPEALS.

1. The court will not give costs upon an appeal, though only one side is heard, where a question of law, the fair subject of doubt, is involved. *Croucher, App., Broune, Resp.* 97
2. A waiver by the respondent of the notice to him, required by the 6 & 7 Vict. c. 18, s. 64, will not entitle the court to entertain the appeal in his absence. *Newton, App., Overseers of Mobberley, Respp.* 203

V. PARTICULAR POINTS.

- Abode, description of place of, 12, 15, 16^a, 187.
- Actual possession, 217.
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- Amendment, 25.
- Charitable foundation, 31.
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GENERAL INDEX

TO

THE PRINCIPAL MATTERS

CONTAINED IN THIS VOLUME.

ABATEMENT OF SUIT.

Without plea. Page 522 (a)

ACKNOWLEDGMENT OF DEED.

Filing Certificate of, under 3 & 4 W. 4, c. 74.

1. The court allowed an acknowledgment to be received and filed under the 3 & 4 W. 4, c. 74, s. 85, where the affidavit verifying the same was sworn before "The Provisional British Consul for the Society Islands," it appearing that there was no notary, or any other official person before whom it could have been sworn, within many hundred miles. *In re Rebecca Darting.* 347
2. The court refused to allow an affidavit and notarial certificate of an acknowledgment, to be filed, under the 3 & 4 W. 4, c. 74, s. 85; the affidavit purporting to be sworn before one "G., a commissioner for taking affidavits in the court of Queen's Bench, Canada West," and the notary certifying him to be a commissioner of that court, and, as such, qualified to administer oaths. *In re Street.* 364

ACT OF PARLIAMENT.

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See CHAPEL OF EASE.

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See CASE.

ADVOWSON.

See CHAPEL OF EASE.

AFFIDAVIT.

I. Of Debt.

i. For Interest.

1. An affidavit, stating that the defendant is indebted to the plaintiff in a certain sum—on a bill of exchange for such an amount, and for money lent, and interest,—without showing that the interest is payable under a contract, is not sufficient. *Neale v. Snodden.* 320

II. Of Merits.

See COSTS, pl. 7.

AGREEMENT.

See CONTRACT.

GUARANTEE.

ALGIERS.

Custom of Port of.

See CONTRACT, pl. 6.

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See BOND.

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ARREST OF JUDGMENT.

See CASE, pl. 1.

GUARANTEE, pl. 3.

ASSUMPSIT.

Special Action of.

See CONTRACT, pl. 1, 4.

ATTACHMENT.

See COSTS, pl. 8.

ATTORNEY.

I. Examination and Admission.

See pp. 790, &c.

II. Bill of Costs.

1. An attorney's bill must show the court and the cause in which the business referred to in it, or the greater part thereof, was done. These particulars should be expressly stated, (held to be necessary by Maule, J.,) or must be capable of being collected by fair and reasonable intendment from the nature of the several items of charge. *Martindale v. Falkner.* Page 706
2. The statute of limitations does not begin to run against costs incurred in a suit, until the suit is terminated. *Ibid.*

III. Misconduct.

See NEW TRIAL.

IV. Letter of Attorney.

See pp. 844, 845 (a), 857 (a).

BAIL.*See* **BANKRUPT.****BAILMENT.***See* **HACKNEY CARRIAGES.***And see* p. 882 (a).**BANKRUPT.***Proceedings on Bond given under 1 & 2 Vict.*
c. 110, s. 8.

1. To debt against one of the principals, on a bond, with sureties, given under the 1 & 2 Vict. c. 110, s. 8—reciting, “that the plaintiff had filed and served an affidavit of debt in bankruptcy against the defendant and his partners, and conditioned for the payment of such sums as should be recovered in any action which had been, or should be, brought for recovery of the debt, or for the render of themselves by the defendant and his partners to the custody of the court in which such action had been, or might be, brought, according to the practice of such court, or within such time, and in such manner, as the said court, or any judge thereof, should direct, after judgment should have been recovered in such action or actions,” the defendant pleaded, that, after the recovery of the judgment, and before the commencement of the action, *no ca. sa.* was sued out against the defendant and his partners, or any of them:—*Held*, a good plea. *Hinton v. Acraman.* Page 367
2. The declaration further stated a judgment recovered by the plaintiff in the court of Exchequer, for the debt in the condition of the bond mentioned; and that, after the recovery of the judgment, an order was made by Coleridge, J., on the *ex parte* application of the plaintiff, that the defendant and his partners should render themselves within ten days after service of the order:—*Held*, that a plea that the order of Coleridge, J., was made before the time for rendering the defendant and his partners according to the practice of the court had expired, and was made *ex parte*, and without any previous summons, was bad; for, that it was consistent with the order that the time for rendering would have expired before the time limited by that order for the defendant and his partners to render; and it was no ground of objection to the order that it was made *ex parte*, such irregularity (if any) not being the proper subject of a plea. 367
3. The declaration also alleged that the time for rendering had been further extended, by two orders of Cresswell, J., until the fifth day of Michaelmas term; that, before that day, a rule nisi was obtained to set aside the order of Coleridge, J., and to enlarge the time to render, by which rule the proceedings in the original action and against the bail were stayed; and that the defendant and his partners did not render themselves

within the time mentioned in the order, or any of them, or within any other time, or in any other manner lawfully directed by the court, or any judge thereof. Plea, that the first order was made before the time for the render of the defendant and his partners according to the practice of the court; that the subsequent orders, and the rule nisi were respectively made before the expiration of the extended times for rendering; that, on cause being shown against the rule nisi, the court ordered “that the defendant and his partners, and their bail or sureties,” should have ten days’ further time to render; and that, before the expiration of the ten days, they did render:—*Held*, a good plea, on the ground that the rule nisi staying the proceedings, preserved the jurisdiction of the court to grant the further extension of the time.

Page 367

4. The defendant further pleaded that an action had already been brought by the plaintiff against the defendant and his partners before the execution of the bond, to recover the debt in the condition mentioned, that that action was still pending, and, that the present action was not commenced until after the execution of the bond:—*Held*, bad. *Ibid.*
5. *Held*, also, that the bankruptcy and certificate of the defendant and his partners after the commencement of the action in which the judgment was obtained, but before judgment, furnished no answer to an action upon the bond; the demand arising thereon not being a debt (contingent or otherwise) provable under the fiat, by virtue of any of the provisions of the 6 G. 4, c. 16. *Ibid.*

And see **LIBLEL**, pl. 2.**PLEADING**, pl. 13.**BARON AND FEME.***See* **ACKNOWLEDGMENT.****VENUE.****BENEFICE.***Donative or Presentative.**See* **CHAPEL OF EASE.****BILLS AND NOTES.****I. Notice of Dishonour.**

1. *Held*, that any acknowledgment by the drawer of a bill, of his liability to pay, or any promise to pay, the amount, though conditional as to the mode of payment, is evidence to be left to the jury, of due notice of dishonour, and, in the case of a foreign bill, of due protest. *Campbell v. Webster.*

258

II. Payment after Maturity.

2. A. being sued on a joint and several promissory note made by himself and by B. and C., pleaded that he paid to the plaintiff, and the plaintiff accepted and received, the

moneys in the declaration mentioned, in full satisfaction and discharge of the debt and damages in the declaration mentioned:—*Held*, that the plea was sustained by proof that the amount of the note was paid by C. *Beaumont v. Greathead.* Page 494

3. *Held*, also, that the jury were not bound to give nominal damages, though the money was not paid until some time after the maturity of the note. *Ibid.*

And see **INSOLVENT DEBTOR**, pl. 1.
STAMP, pl. 1, 2.

BOND.

Alternative Condition.

1. *Held*, that an action of debt lies at the suit of A. against C. on a bond by which C. acknowledges himself to be bound to A. in 100*l.* to be paid to A. or B. *White v. Hancock.* 330
2. *Held*, also, that a declaration upon such a bond is sufficient without noticing B., although the alternative mode of payment appears by the bond as set out upon oyer, and although the declaration negatives payment to A., but is silent as to non-payment to B. *Ibid.*

And see **BANKRUPT**, pl. 1.

CABRIOLET PROPRIETOR.

See **CASE**, pl. 1.

HACKNEY CARRIAGES.

CAPIAS.

I. *Ad Respondendum.*

See **PRACTICE**, III.

II. *Ad Satisfaciendum.*

See **BANKRUPT**, pl. 1.

CARRIER.

See **HACKNEY CARRIAGES.**

And see p. 883 (a).

CASE.

For Malfeasance.

i. *Defacing Driver's License.*

2. By the 6 & 7 Vict. c. 86, s. 21, the proprietor of a hackney carriage is required to retain in his possession the license of every driver, &c., employed by him, while such driver, &c., remains in his service. A declaration in case stated, that the plaintiff obtained a driver's license under the act; that he was employed by the defendant, a proprietor of a hackney carriage, and, under the provisions of the act, delivered the license to him; and that, whilst the license remained in the defendant's possession, the latter "*wrongfully and unjustly* wrote in ink upon the license certain words purporting, and then being intended by the defendant,

to give a character of the plaintiff as an unfit person to act as a driver of hackney carriages, that is to say," &c., &c.; by reason whereof the license became defaced and wholly useless to the plaintiff, and the plaintiff was prevented from obtaining employment as a driver, &c.:—*Held*, on motion in arrest of judgment, that the action was maintainable,—that case was the proper form,—and that the declaration was sufficient. *Hurrell v. Ellis.* Page 295

2. A declaration in case stated that B. (the defendant) had charged C. with embezzlement; that it was agreed between B. and A., (the plaintiff,) that B. should abstain from prosecuting C., and that, in consideration thereof, C. should draw, and A. should accept a bill of exchange, and that C. should endorse the same to the defendant. The declaration then went on to aver that a bill was drawn, accepted, and endorsed to B., pursuant to this corrupt and illegal agreement; that B., well knowing the illegal nature of the transaction, and that A. was not liable at law to pay the amount of the bill, and that there was no reasonable or probable cause for suing him thereon, conspired with D., a pauper, that the bill should be in bond to D., and that D. should sue A. upon the bill, for the sole benefit of B.; and that an action was accordingly brought by D. against A., in which A. obtained a verdict on the ground of the illegality of the consideration for the acceptance, but was unable to obtain his costs, in consequence of the insolvency of D.:—

Held, that, inasmuch as A. could not make out his case except through the illegal transaction to which he himself was a party, the action would not lie. *Fivaz v. Nicholls.* 501

3. *Semble*, that no action will lie against a party for inciting a third person to bring a civil action against the plaintiff without reasonable or probable cause. *Fivaz v. Nicholls.* 501

And see **PROBABLE CAUSE.**

CERTIFICATE.

See **BANKRUPT**, pl. 5.

Under court of requests act, by sheriff on a writ of trial. 911

CHAMPERTY.

See **NEW TRIAL.**

CHAPEL OF EASE.

Whether Donative or Presentative.

1. A private act of parliament—after providing for a sale of glebe land, and the erection of an additional church with part of the proceeds—directed that the curate of the new church should, during the incumbency of A., the then rector, be appointed by him;

and that, after the death, avoidance, or resignation of A., the new church should become the principal church, with all the accustomed rights, immunities and privileges appertaining to a mother church, and the then church should become and be deemed a chapel of ease thereto, to be served by a minister capable of having cure of souls; and that "the patronage of or right of *presentation* to the chapel, as well as the patronage of or right of *presentation* to the new church, should be vested in the patron of the rectory, his heirs and assigns, *so, nevertheless, that the minister of the chapel should not be removable at pleasure*:"—

- Held*, that the chapel or district church thus created was *representative*, and not *donative*. *The Queen v. Foley, Clerk.* Page 664
2. *Seem*, that, if it had been at first *donative*, it would have ceased to be so, upon a *presentation* being once made by the patron to the ordinary, followed by the institution and induction of the presentee. *Ibid.*

CHARTER-PARTY.

See CONTRACT, pl. 6.

CHURCH.

See CHAPEL OF EASE.

COGNOVIT.

See WARRANT OF ATTORNEY.

COLOUR.

See PLEADING, pl. 13.

COMMISSION.

To examine Witnesses.

1. Upon a motion, on the part of the defendants, for a commission to examine witnesses abroad, it was required that it should appear, to the satisfaction of the court, upon an affidavit from *their attorney*, that the evidence of the witnesses, proposed to be examined, was material and necessary to the defence of the action. *Healy v. Young.* 702

COMMODATUM.

See p. 882 (a).

COMPOSITION WITH CREDITORS.

See COSTS, pl. 5.

COMPOUNDING FELONY.

See JOINT TORT-FEASORS, pl. 2.

CONCLUSION OF PLEA.

See p. 522 (b).

CONDITION.

Whether Precedent.

1. The declaration stated that, in consideration that the plaintiff would accept, receive and pay for certain goods, the defendant promised to supply them of the various sizes to be shown in drawings to be provided by the plaintiff's architect, at a certain price, and to use his, the defendant's, best endeavours

to deliver certain quantities on certain specified days, provided the drawings for the first quantity were sent to the defendant within three days, and, for the remainder, within three weeks; and averred that, although the plaintiff had always been ready and willing to accept and receive the goods, and although he did, *within a reasonable time* after the making of the agreement, duly and according to the said agreement, provide drawings, &c., and although a reasonable time had elapsed, the defendant did not within a reasonable time supply the goods.

Plea—that the plaintiff did not, *within the time so agreed upon*, duly and according to the agreement, provide or deliver drawings, &c.:

Held, bad, the delivery of the drawings within the specified times not being a condition precedent to the obligation to deliver the goods. *Kingdom v. Cor.* Page 661

And see CONTRACT, pl. 2.

PLEADING, pl. 14.

CONFIDENTIAL COMMUNICATIONS

See LIBEL.

SLANDER.

CONSCIENCE, COURTS OF.

See COURTS OF REQUESTS.

CONSIDERATION.

I. *Sufficiency of.*

See GUARANTEE, pl. 3, 3.

PLEADING, pl. 3.

II. *Divisibility of.*

See p. 684 (a).

III. *Executed.*

See STATUTE OF FRAUDS.

IV. *Statement of.*

See GUARANTEE, pl. 1, 4, 5.

CONSTABLE.

Authority of.

See TRESPASS, pl. 4.

CONTINGENT CONTRACT.

See STATUTE OF FRAUDS, pl. 2.

CONTINGENT DEBT.

See BANKRUPT, pl. 5.

CONTRACT.

I. *Construction of.*

1. B. engaged to supply an engine and boilers for a steam vessel of A., "in conformity to the drawings and specification furnished by C.; the engine to be got up under the superintendence of C., and, when approved by him at the works, to be delivered by B. into the East India Docks, when B.'s liability ceases."

One of the terms contained in the specification was, that the engine, &c., should be completed *within two months* :—

Held, that time was of the essence of the contract, and that B. was liable to an action at the suit of A. for not delivering the engine and boilers within the two months. *Wimshurst v. Deeley*. Page 253

2. A. sells goods to B., to be paid for partly in cash, and the residue by bills at intervals of three months each:—The payment of the money and the delivery of the bills do not constitute a condition, so as to entitle A., upon non-payment of the money and non-delivery of the bills, to sue as for goods sold and delivered, without waiting the expiration of the credit. *Paul v. Dod*. 800
3. Nor can such action be maintained for the amount of the stipulated cash payment.

Ibid.

4. A.'s remedy is, by special action on the express contract. *Paul v. Dod*. 800
5. The plaintiffs contracted to fit up for the defendant a brewery at the house of a third person, the whole to be fixed complete for a certain sum, nothing being said about the time or mode of payment. When a portion of the work was done, the plaintiffs refused to complete it without security, which the defendant refused to give. In an action against the defendant for not permitting the plaintiffs to proceed with or complete the work, or paying for what was done, it was left to the jury to say by whose default the work was stopped. The jury having found a verdict for the defendant, the court declined to interfere. *Pontifex v. Wilkinson*. 349

II. *Parol Evidence, to explain.*

6. By a charter-party, A., the owner, agreed that the ship should proceed to the Tyne, and there load a cargo of coals, and proceed therewith to Algiers, and deliver the same there, on payment of certain freight. B., the charterer, engaged that the vessel should be unloaded at a certain average rate per day; and that, if detained for a longer period, he would "pay for such detention at the rate of 5*l.* per diem, to reckon from the time of the vessel being ready to unload, and in turn to deliver."

According to the general regulations of the port of Algiers, vessels may commence unloading as soon as they enter within the mole: but, by a special regulation of the French government, coals destined for the use of the marine department are required to be unladen at a particular spot, and in a given order:—

Held, that evidence was admissible to show that the words "in turn to deliver" had, by the usage of the particular trade, acquired a known meaning in reference to this special regulation with respect to coals for the use of the French marine department, although A. was not cognisant of the fact of the coals having been shipped under a contract with

the French government; but that the testimony of three or four witnesses, speaking to a course of business that had only grown up within about five years, and with reference to charter-parties, the language of which was not identical with that of the charter-party in question, was insufficient to establish such general usage. *Robertson v. Jackson*. Page 412

7. *Held*, also, that the special regulation as to the unloading of coals for the French marine department, was to be considered one of the regulations of the port, binding upon all vessels entering the port. *Ibid*.

And see PLEADING, pl. 2, 3, 7, 8, 9.
RAILWAY SHARES.

COSTS.

1. *Of Issues under 6 & 7 W. 4, c. 71, s. 46.*
1. *Semble*, that a defendant is not entitled to judgment as in case of a nonsuit where the plaintiff has allowed two assizes to elapse without proceeding to trial after issue joined on a feigned issue under the tithe-commutation act, 6 & 7 W. 4, c. 71, s. 46: but should move for the costs of the action, under that section. *Tomlinson v. Boughey*. 844
2. The discretion as to allowing costs in such a case is, in the absence of special circumstances, to be exercised in accordance with the general rule which gives costs to the successful party. *Ibid*.
3. Where, therefore, the plaintiff declined to proceed to trial, because a decision of the court had so narrowed the issue as to render it inexpedient for him to incur the expense of a trial:—*Held*, that the defendants were entitled to their costs. *Ibid*.

II. *Costs of Remanets.*

4. The costs occasioned by a cause being a remanet, are costs in the cause, not taxable, as costs of the trial, on a rule for a new trial on payment of costs. *Bentley v. Carver*. 817

III. *Costs of the Day.*

Where plaintiff sues in formâ pauperia.
See PAUPER.

IV. *Security for Costs.*

5. The plaintiffs had compounded with their creditors, and one of them resided abroad. No ground for requiring security for costs. *Thomel v. Rôelants*. 290

V. *Taxation of.*

i. *Notice of Taxation.*

6. *Quere*, whether a judgment in debt by default, signed without notice of taxation, is irregular. *Ilderton v. Sill*. 249
7. But a judgment so signed was set aside without costs, upon an affidavit of merits. *Ibid*.

ii. *Order for Payment.*

8. Where an attorney obtains an order for the taxation of his bill, he cannot proceed by attachment without first obtaining an order for payment of the amount certified to be due. *In re Woodhouse.* Page 290

And see ATTORNEY, II.

COUNSEL'S SIGNATURE.

The signature of counsel to the pleadings need not appear in the issue delivered. *Jefferies v. Yablonski.* 781

And see SPECIAL CASE.

COURT-BARON.

I. *Constitution of.*

1. In a suit in a court-baron, the proceedings were alleged to have been taken at a court held "before A., the steward of the said court, a free suitor thereof, and B. and C., and others, free suitors of the said court:"—

Held, that the court was properly constituted, it being alleged that A. was a free suitor. *Brown v. Gill.* 861

II. *Description of.*

2. *Held*, also, that the court was properly described; and that it was sufficient to set forth the names of two only of the free suitors who attended. *Ibid.*
3. *Held*, also, that A. was properly described as steward of the court, though it was not alleged that he was steward of the manor. *Ibid.*

III. *Proceedings in.*

4. An omission to state in the plaint the nature of the action, is a mere irregularity, which may be waived. *Ibid.*

COURTS OF REQUESTS.

I. *Certificate of probable Cause.*

1. The sheriff or other inferior judge to whom a writ of trial is directed out of a superior court, has no authority to certify under the Tower Hamlet's court of requests act, 23 G. 2, c. 30, s. 8, (extended by 19 G. 3, c. 68, and 2 W. 4, c. 65, abolished by 9 & 10 Vict. c. 95,) that there was probable or reasonable cause of action for 40s. or more. *Capes v. Jones.* 911

II. *Suggestion.*

2. By the seventh section of that act it is enacted, that, if any action be brought elsewhere, for a demand cognisable in the local court, and it shall appear to the judge or judges of the court where the action is brought, that the debt to be recovered does not amount to 40s., and the defendant shall duly prove, by sufficient testimony, to be allowed by any judge or judges of the court where the action shall depend, that, at the time of commencing such action, the defendant was inhabiting and residing within the district, and liable to be warned or sum-

moned before the court of requests for such debt, the said judge or judges shall not allow to the plaintiff any costs, but shall award costs to the defendant. The eighth section provides, that, where the plaintiff shall, in any action brought in a superior court, obtain a verdict for less than 40s., if the judge or judges who shall try the cause shall certify that there was probable or reasonable cause of action for 40s. or more, the plaintiff shall not be liable to pay costs, but shall recover his costs as if that act had not been made. And the twenty-first section enacts that no action or suit for any debt not amounting to 40s., and recoverable by virtue of that act in the said court of requests, shall be brought against any person residing or inhabiting within the jurisdiction thereof, in any other court whatsoever.

An action having been brought in this court against a party liable to be sued in the local court, and the jury having, on the trial before the secondary of London, found a verdict for less than 40s.—*Held*, that the defendant was not bound to avail himself of the prohibitory clause by plea or by evidence at the trial; but was at liberty—notwithstanding the trial took place before a judge who had no power to certify under sect. 8—afterwards to apply to the court for leave to enter a suggestion under sect. 7. *Capes v. Jones.* Page 911

COVENANT.

See LETTERS PATENT, pl. 2.
PLEADING, III.
PRACTICE, VII.

CRIMINAL CONVERSATION

See VENUE.

CURATE.

See p. 697, n.

DEBT.

See BOND, pl. 1.
PLEADING, IV.

DEFAMATION.

See LIBEL.
SLANDER.

DEMURRAGE.

See CONTRACT, pl. 6.

DEPOSITUM.

See p. 882 (a).

DISTRICT CHURCH.

See CHAPEL OF EASE.

DONATIVE.

See CHAPEL OF EASE.

DUPPLICITY.

See PLEADING, V. iii.

EMBEZZLEMENT.

See *Cass*, pl. 2.

EVIDENCE.

Competency of Witness.

1. In trover by A. against B. for two promissory notes, B. pleaded, that, before A. was possessed of the notes, one C. was lawfully possessed thereof, as of his own property, that they had been fraudulently obtained from C., and wrongfully delivered to A., whereupon B., as the agent of C., and by his direction and authority, took the notes out of the possession of A. The replication traversed the property in C.

C., being called to support the affirmative of this issue, stated, on the *voir dire*, that he had not indemnified B., and had nothing to do with the action:—

Held, that he was an admissible witness under the 3 & 4 W. 4, c. 42, s. 26, and the 6 & 7 Vict. c. 85. *Hearne v. Turner.*

Page 553

2. And *semble*, that he was competent at common law. *Ibid.*

And see *COMMISSION.*

CONTRACT, pl. 6.

NEW TRIAL.

EXECUTED CONSIDERATION.

See *STATUTE OF FRAUDS.*

EXECUTORS AND ADMINISTRATORS.

Plea of ne unques Executor.

And see *PLEADING*, pl. 10.

1. The plaintiff declared against A. and B. as executors, alleging that they as executors were indebted to him for the use and occupation of certain messuages held of him by them as executors under a demise to the testator, and that, in consideration of the premises, they as executors promised to pay.

Held, that the declaration was good in substance. *Atkins v. Humphrey.* 654

2. A. pleaded that B. never was executor, nor ever administered.

Held, that the plea was bad, as setting up a personal discharge, of which B. only could avail himself. (a) *Atkins v. Humphrey.*

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FEIGNED ISSUE.

Form of.

1. A feigned issue, in the form of a wager, directed under the interpleader act, is not rendered illegal by the prohibition of actions upon wagers in 8 & 9 Vict. c. 109. *Luard v. Butcher.* 858

(a) *Vide tamen*, p. 660, n.

2. The adoption of the form of issue given in the schedule to that act, is not compulsory.

Page 858

FRAUDS, STATUTE OF.

See *STATUTE OF FRAUDS.*

GUARANTEE.

Construction of.

1. A declaration stated, that, in consideration of advances already made by A., and that A. would from time to time make advances to C., B. promised to repay A. the last-mentioned advances. The consideration on the face of the guarantee was—"in consideration of advances made and to be made by A., or by any other person of whom A' firm may, from time to time, consist:—" *Held*, a variance. *Chapman v. Sutton.*

634

2. A guarantee was given in these terms:—"In consideration of advances made and to be made by A. and B., or by any other persons of whom their firm may, from time to time, consist in the way of loan, &c., we jointly and severally hereby guaranty to A. and B. the repayment of the said advances, and to indemnify them against any loss by reason of such advances; our liability not to exceed 1000*l.*; this guarantee to be a continuing guarantee, and to be a security to A. and B. to the extent of 1000*l.* as aforesaid, for the whole of any balance which may from time to time, or at any time, become due to A. and B., or to the persons for the time being constituting the firm:—" *Held*, that this instrument disclosed a sufficient consideration for the defendant's promise, though there had been no change in the firm. *Chapman v. Sutton.* 634

3. A declaration on a guarantee stated, that, in consideration that A., the plaintiff, would sell and deliver goods to C., B., the defendant, promised A. to guaranty to him the payment of the amount of, or the balance unpaid to A., for any goods, then sold and delivered, and to be thereafter sold and delivered, and of any money lent, or to be lent to, or paid for C. by A., to the extent of 1000*l.*, and that A. should be at liberty, at any time thereafter, to call upon B. for the payment of the 1000*l.*, which might be applied by A. as A. thought proper, either in payment or part-payment of any debt which might be due or have been due to A., and should not have been paid by C.

Held, on motion in arrest of judgment, that the declaration disclosed a sufficient consideration for the promise. *Boyd v. Moyle.* 644

4. The guarantee produced in evidence to

support this declaration, was addressed, in the alternative, "to Messrs. A. & Co., or the person or persons for the time being carrying on the business" of that firm:—*Held*, no variance,—no change in the firm having in fact taken place; or, that, if there were any variance, such variance would be amendable under the 3 & 4 W. 4, c. 42, s. 23. Page 644

5. The breach assigned in the declaration was, that the defendant had not *guaranteed* the payment, or *paid*. The defendant pleaded, *inter alia*, that he had *guaranteed* the payment:—*Held*, that the words in the breach were not to be understood as used disjunctively; and that proof that the defendant had executed the instrument of guarantee, did not entitle him to a verdict on that issue. *Ibid*.

HACKNEY CARRIAGES.

I. Liability of Proprietor of.

1. In assumpsit against a cab proprietor, the declaration stated, that the plaintiff hired the vehicle, and that, in consideration of the premises, and that the plaintiff, with his luggage, would become a passenger, and of certain reward, the defendant promised the plaintiff to carry and convey him and his luggage *safely and securely* from, &c., to, &c., and alleged a loss of part of the luggage by the negligence of the defendant's servants:—

Held, that the declaration was sufficient to charge the defendant for a breach of his implied duty to use an ordinary degree of care—the words "*safely and securely*" not necessarily importing a more extended liability. *Ross v. Hill*. 877

II. Defacing Driver's License.

See *CASE*, pl. 1.

HOLIDAYS.

1. Where the eighth day after service of a writ of summons falls on any day between the Thursday next before, and the Wednesday next after Easter day, the last day for entering an appearance thereto is the Wednesday next after Easter day, the rule of court of Easter term, 2 W. 4, being overridden by the statute 2 W. 4, c. 39, s. 11. *Harris v. Robinson*. 908

HUSBAND AND WIFE.

See *ACKNOWLEDGMENT*.

VENUE.

IGNORANTIA JURIS.

See p. 261 (b).

INQUIRY, WRIT OF.

See *WRIT OF INQUIRY*.

INSOLVENT DEBTOR.

Plea of Discharge, under 5 & 6 Vict. c. 116.

1. To a declaration by an endorsee against the acceptor of a bill, the latter pleaded, that not being a trader within the bankrupt laws, and having resided twelve calendar months within the Birmingham district, he, after the bill became due, and before the commencement of the suit, duly petitioned the district court of bankruptcy for protection from process, under the 5 & 6 Vict. c. 116; that such proceedings were had upon the said petition, that a final order was made by a commissioner, duly authorized, for the protection of the person of the defendant from process, and for the vesting of his estate and effects in an official assignee; and that no assignee was chosen by the creditors of the defendant, or by any of them; whereby, and by force of the said order, the defendant was discharged from the bill and cause of action in the declaration mentioned—*verification*.

Held, on special demurrer, that this was not a good plea under the fourth section of the statute, inasmuch as it did not aver all the facts necessary to show the requisites of that section to have been complied with; nor (*dissentiente*, Erle, J., and *dubitante*, Maule, J.) within the tenth section, the form prescribed by that section not having been strictly followed. *Gillon v. Deane*. Page 309

2. *Held*, also, that the plea properly concluded with a verification. *Ibid*.
3. *Semble*, per Maule, J., that the adoption of the short form of plea given by the tenth section is not imperatively required. *Ibid*.

INSURANCE.

Constructive total Loss.

1. A policy was effected upon a ship valued at 17,500*l.*, from China to Madras, while there, and back to China. The ship had originally been purchased by the owners for 11,000*l.*, and was, at the time of effecting the policy, together with her stores, seamen's wages, and other matters not constituting her permanent value, of the value to the plaintiffs of the sum mentioned in the policy. During the voyage, the ship was damaged by perils of the sea, so as to become incompetent to proceed on the voyage, unless repaired at an expense of not less than 10,500*l.*, and, being so repaired, she would have been worth a sum not exceeding 9000*l.*, which was her marketable value at the time of effecting the policy, and immediately before the damage.

Upon a special verdict finding the above facts, and also finding that a prudent owner,

being uninsured, would not have repaired the vessel, and that she was duly abandoned:—
Held, in affirmance of the judgment of the court below, that the underwriters were liable as for a total loss. *Irving v. Manning*.
Page 784

INTEREST.

See AFFIDAVIT, I.

INTERPLEADER.

Form of Issue.

See FRIENDED ISSUE.

IRREGULARITY.

See COURT-BARON, pl. 4.

ISSUABLE PLEAS.

See PLEADING, VI.

ISSUE.

See FRIENDED ISSUE.

WRIT OF TRIAL, I.

JOINT TORT-FEASORS.

One of two parties to an agreement to suppress a prosecution for felony cannot maintain an action against the other, for an injury arising out of the transaction in which they have both been illegally engaged. *Fitz v. Nicholls*. 501

JUDGES' NOTES.

The court will not aid a party seeking to obtain a copy of the notes taken at a trial. *Parkhurst v. Gosden*. 894

JUDGMENT AS IN CASE OF A NONSUIT.

See PRACTICE, pl. 5.

JUDGMENT NON OBSTANTE VEREDICTO.

See PRACTICE, pl. 6.

JUSTICES, WRIT OF.

See p. 874 (b).

LETTER OF ATTORNEY.

See STAMP.

LETTERS PATENT.

Construction of Specification.

1. The words of a specification are to be construed according to their ordinary and proper meaning, unless there be something in the context (which may be explained by evidence) to show that a different construction ought to be made. *Elliott v. Turner*. 446
2. In covenant on an indenture whereby the defendants were licensed to make and sell buttons according to the plaintiff's patent, the issue was whether certain buttons made by the defendants were made under the li-

cense. The specification described the invention to consist in the application to the covering of buttons, of such figured woven fabrics "wherein the ground or the face of the ground thereof, is produced by a warp of soft or organzine silk, such as is used in weaving satin, and the classes of fabrics produced therefrom." At the trial, the jury asked the judge how they were to interpret the word "or" in the specification, whether it was disjunctive, or, whether "organzine" was the construction of the word "soft." The judge told them, that, in his opinion, unless the silk were organzine, it was not within the patent:—

Held, upon a bill of exceptions, that this direction was erroneous; for, that the judge should have told the jury, not that soft and organzine silk were absolutely the same, but that the words were capable of being so construed, if the jury were satisfied that, at the date of the patent, there was only one description of soft silk, and that organzine, used in satin weaving; but, otherwise, that the proper and ordinary sense of the word was to be adopted, and the patent held to apply to every species of soft silk, as well as to organzine silk. *Elliott v. Turner*.
Page 446

LIBEL.

Privileged or Confidential Communications.

1. C., the mate of a ship, sends to B., a stranger, a letter charging A., the captain, with gross misconduct. B. shows this letter to D., the owner, who dismisses A.

Held, by Tindal, C. J., and Erle, J., that the showing of the letter by B. to D. was a privileged communication.

Held, by Coltman and Cresswell, Js., to be not privileged. *Coxhead v. Richards*. 569

2. A., a trader, being indebted to B. upon an unexpired credit, employs C. to sell his goods by auction, and absents himself, under circumstances sufficient to induce B. to believe that an act of bankruptcy has been committed. B. gives notice to C. not to pay over the proceeds to A., "he having committed an act of bankruptcy." In an action by A. against B., charging this notice as a libel, it was held by Tindal, C. J., and Coltman and Erle, Js., to be a privileged communication, *dissentiente*, Cresswell, J. *Blackham v. Pugh*. 611
And see SLANDER.

LICENSE.

See CASE, pl. 1.

LIMITATION OF ACTIONS.

I. Time, how computed.

1. When costs are incurred in a suit, the statute does not begin to run against the earlier items until the suit is terminated. *Martindale v. Falkner*. 704

II. *Appropriation of Payments.*

2. *Semble*, that, where there are two clear and undisputed debts, the case is not taken out of the statute of limitations as to either debt, by evidence of a part-payment within six years, not specifically appropriated to the one debt or to the other. *Burn v. Boulton*.

Page 476

3. To debt for principal and interest on a promissory note for 130*l.*, dated in 1827, with a count for work and labour, the defendant, in 1845, pleaded, respectively, *non fecit*, and *nunquam indebitatus*, and, to the whole, the statute of limitations. At the trial the note was duly proved; and it appeared that, in 1834, there had been a settlement of interest thereon, but, that although small sums of money had occasionally been handed by the defendant to the plaintiff, there had been no *specific* payment on account of the note since that period.

Besides the principal and interest on the note, the plaintiff claimed to be entitled to recover wages as a domestic servant, from 1827 to October, 1843. There was conflicting evidence as to the terms upon which the plaintiff, who was a distant relation of the defendant, had become an inmate of his house,—the defendant insisting that there had been no contract for wages, and that the occasional payments relied on by the plaintiff were mere donations.

The jury returned a verdict for the plaintiff for wages, at the rate of 7*l.* per annum for the first eleven years, and at 5*l.* per annum for the last six; and, as to the count on the note, it was reserved for the court to say whether or not there was any evidence from which a jury would be warranted in inferring that the payments proved, had been made on account of the debt due on the note; with liberty to the defendant to move to reduce the verdict:—

Held, that, inasmuch as the defendant had, throughout, denied the existence of any debt for wages, the jury were warranted in finding the payments to have been part-payments on account of note; and, consequently, that the plaintiff was entitled to retain his verdict in respect of so much of the issues as related to the first count, and for wages for the last six years in respect of those parts of the issues which related to the second count. *Burn v. Boulton*. 476

LOCAL COURT.

See COURTS OF REQUESTS.

LOCATIO REL.

See p. 881 (a).

MANDATUM.

See p. 881 (a).

MANOR.

See COURT-BARON.

MASTER AND SERVANT.

See CASE, pl. 1.

LIMITATION OF ACTIONS, II.

MATERIAL EVIDENCE.

See VENUE.

MEMORANDA.

Pp. 366, 748.

METROPOLITAN-POLICE ACT.

See TRESPASS, II.

MODUS.

See p. 756 (b).

MONEY LENT.

I. *What sufficient Evidence to support a Count for.*

A., in 1837, transferred 1000*l.* in the 4 per cents. to B., who possessed other stock of the same description. B., after some years, sold out all his stock, including the 1000*l.* B. made payments to A. equal to interest at 5 per cent. upon that sum until A.'s death. After the death of A., her executor wrote to B., referring to the transaction as a loan of money; B. in reply asserted that he was employed by A. to purchase an annuity for her, and that he had done so. No purchase of an annuity was proved:—*Held*, that there was evidence to go to the jury in support of a count for money lent. *Howard v. Danbury*. Page 803

MORTGAGE.

See PLEADING, pl. 13.

NEW ASSIGNMENT.

See TRESPASS, pl. 1.

NEW TRIAL.

The plaintiff's attorney having given evidence on his behalf, and it being afterwards discovered that his client had previously assigned to him all his interest in the event of the suit, the court set aside a verdict found for the plaintiff, without entering into the consideration of the probable effect of the evidence so given upon the minds of the jury. *Wade v. Simeon*. 343

NEWSPAPER.

Evidence of Proprietorship.

The fact of A.'s name appearing as proprietor in the declaration filed at the stamp-office, pursuant to the 6 & 7 W. 4, c. 76, ss. 6, 8, does not render A. liable in respect of a contract entered into specifically with B., the real proprietor, after A. had ceased to be interested in the newspaper. *Holcroft v. Hoggins*. 488

NON ASSUMPSIT.

See PLEADING, I. iii.

NONSUIT, JUDGMENT AS IN CASE OF.

See PRACTICE, pl. 5.

NOTICE.

L. Of Dishonour.

See BILLS AND NOTES.

II. Of Taxation.

See COSTS, V. i.

PARTNERS.

I. Set-off of Debt due from one of several.

See PLEADING, pl. 1.

PATENT.

See LETTERS-PATENT.

WORK AND LABOUR.

PATRONAGE.

See CHAPEL OF EASE.

PAUPER.

I. Misconduct in Suit by.

1. Where a plaintiff suing in *forma pauperis* neglects to proceed to trial pursuant to notice, the proper course is, to move for costs of the day, under the rule of Hilary term, 2 W. 4, c. 110, and not to dispauper him. *Hodges v. Toplis.* Page 773

2. Notice of trial having been given, and the cause entered, the attorney's clerk was, by an accidental blunder in issuing the jury process, prevented from passing the record in due time. The court directed the pauper to pay the costs of the day. *Hodges v. Toplis.* 773

PAYMENT.

I. To take a Case out of the Statute of Limitations.

See LIMITATION OF ACTIONS, pl. 2, 3.

II. Plea of.

See PLEADING, IV., pl. 11.

PLAINT.

See COURT-BARON.

PLEADING.

I. In Assumpsit.

i. Set-off.

1. To assumpsit by A., B. and C., against D. for money had and received, D. pleaded, that, before the money had been received, &c., the plaintiffs carried on the trade of founders in partnership; that, while they were such partners, A., with the privity and concurrence of B. and C., employed D., an auctioneer, to sell certain property belonging to the firm; that, at the time A. so employed D. to sell the said property, and at

the time of the sale thereof, and at the time when the debt after mentioned became due from A. to D., D. believed that A. was the sole and exclusive owner of the property, and had full power and authority to sell the same, and to receive the proceeds for his own sole use, D. having no notice or knowledge that B. and C. had any right or interest in the property; that, after A. had so employed D., and before D. had any notice that A. was not sole and exclusive owner of the property, or of the proceeds thereof, A. became indebted to D. in a sum exceeding the moneys in the declaration mentioned, out of which D. was ready and willing to set off and allow the sums in the declaration mentioned.

The plaintiffs replied, that, at the time of selling the property, D. had knowledge that A. was not the sole and exclusive owner of the property.

Held, on demurrer to the replication, that the plea was bad, inasmuch as it did not allege that A. appeared as sole owner of the property with the assent or by the default of his partners; and therefore that it was a mere attempt to set off a debt due from one partner against a debt due to the firm. *Gordon v. Ellis.* Page 821

ii. Readiness and Willingness.

2. In assumpsit for the non-delivery of railway shares, pursuant to a contract, the declaration alleged that "the plaintiffs had always, from the time of the making of the agreement, been ready and willing to accept the transfer of the shares," and that, "although the plaintiffs, after the lapse of a reasonable time for the transfer, requested the defendant to transfer the shares, and tendered, and offered to pay for the same," &c., the defendant did not transfer, &c. The defendant pleaded that the plaintiffs were not *always* from the time of the making of the agreement ready and willing to accept the transfer, &c.

Held, on special demurrer, that the traverse was too large, the allegation of time in the declaration being divisible. *Tempest v. Kilner.* 300

And see HACKNEY CARRIAGES.

iii. Pleas amounting to Non assumpsit.

3. In assumpsit, the declaration stated that the plaintiff had brought an action against the defendant in the Exchequer, to recover certain moneys; that the defendant had pleaded various pleas, on which issues in fact had been joined, which were about to be tried, and that, in consideration that the plaintiff would forbear proceeding in that action until a certain day, the plaintiff promised on that day to pay the amount, but that he made default, &c.

Plea, that the plaintiff never had any

cause of action against the defendant in respect of the subject-matter of the action in the Exchequer, which he, the plaintiff, at the time of the commencement of the former action, and thence until and at the time of the making of the promise well knew:—

Held, sufficient, on general demurrer. *Wade v. Simeon*. Page 548

4. Whether it would have been a good plea, if specially demurred to for not distinctly averring that the plaintiff must have failed in the former action, or on the ground that it amounted to non assumpsit—*quære*. *Ibid*.
5. A further plea set forth a judge's order for staying the proceedings in the action in the Exchequer, on payment of the money on the day appointed, and that, in default of payment, the plaintiff should be at liberty to sign judgment and issue execution for debt and costs; and averred that the promise declared on was a promise deduced and implied from the obtaining and making of that order, and that the order had been subsequently set aside by a rule of the court of Exchequer:—*Held*, bad, on special demurrer, as amounting to non assumpsit. *Ibid*.

II. In Case.

Declarations in.

See HACKNEY CARRIAGES.
JOINT TORT-FEASORS.

III. In Covenant.

6. In an action upon a covenant by the defendant, that he would pay over to the plaintiff the first fruits or proceeds which should be first realized, and "be at the disposition of the defendant," under a sequestration, "forthwith upon the receipt thereof," the declaration alleged that divers moneys, being first fruits and proceeds, were realized, and were at the disposition of the defendant, and that he had not paid them over to the plaintiff:—*Held*, sufficient, on special demurrer, and that it was not necessary to aver actual receipt of the money by the defendant. *Smith v. Nesbitt*. 286

IV. In Debt.

- i. On a Bond given under the 1 & 2 Vict. c. 110, s. 8.

See BANKRUPT.

- ii. Where not maintainable in respect of a special Contract.

7. Where a service to be performed by A. for B. is to be paid for in goods, A. cannot declare in debt for the value of the service, but must sue on the special contract. *Keys v. Harwood*. 905
8. But, if B. by his own act render the delivery of the goods impossible, A. may sue in debt. 905

9. So, if B. allows the goods to be sold under an execution against him. Page 905

iii. *Ne unques Executor*.

10. To a declaration charging the defendant as executor, a plea that he never was executor of the last will, &c., nor ever administered any of the goods or chattels, &c., as in the declaration alleged, was held to conclude properly to the country. *Wood v. Kerry*. 515

And see EXECUTORS.

- iv. Payment, in Satisfaction of Debt and Damages.

11. A., being sued on a joint and several promissory note made by himself, and B. and C., pleaded that he paid to the plaintiff, and the plaintiff accepted and received, the moneys in the declaration mentioned, in full satisfaction and discharge of the debt, and damages, in the declaration mentioned:—*Held*, that the plea was sustained by proof that the amount of the note was paid by C. *Beaumont v. Greathead*. 494
12. *Held*, also, that the jury were not bound to give nominal damages, though the money was not paid until some time after the maturity of the note. *Ibid*.

V. In Trespass.

- i. Justification under a Writ of F. Fa. See TRESPASS, I.

- ii. Justification under Metropolitan-Police Act See TRESPASS, II.

iii. Ambiguity and Duplicity.

13. In trespass for breaking and entering the plaintiff's mill, and taking his fixtures, &c., the defendants pleaded a title in A., as sub-lessee of the premises for a term of years, and that, A. becoming bankrupt before the lease expired, the defendants, as his assignees, elected to take the lease, and entered and became possessed of the mill, &c.—giving the plaintiff express colour.

The plaintiff replied, that A., before his bankruptcy, made a sub-lease to B., by way of mortgage, of the mill, &c., under which sub-lease B. entered and became possessed; that, after A.'s bankruptcy, and whilst B. was so possessed, it was agreed between A., B. and the plaintiff, that B. and A. should grant an underlease of the mill to the plaintiff, and should sell him the fixtures, &c., at a certain price; and that the plaintiff, with the consent of B. and A., before the bankruptcy of the latter, entered and became possessed of the mill, and of the fixtures, &c.

Held, that the replication was not objectionable on the score of ambiguity or duplicity, the whole statement therein forming one complete title in the plaintiff to the possession of the *locus in quo*, and of the fixtures, &c. *Pim v. Grazebrook*. 429

VI. *Issuable Pleas.*

14. A plea framed fairly to raise the question whether the action is not rendered unmain-
tainable by reason of the non-performance
of an alleged condition precedent, is an is-
suable plea. *Zulueta v. Miller.* Page 895

VII. *Traverse too large.*

See Tempest v. Kilner, 300.

And see CONDITION.

EXECUTORS AND ADMINISTRATORS.
INSOLVENT DEBTOR.

POWER OF ATTORNEY.

See STAMP.

PRACTICE.

I. *Process.*

Service out of the County.

1. The court set aside the service of a writ of
summons, the defendant being described
therein as of "Bristol, in the county of
Gloucester," and the service having taken
place in the city of Bristol, in a place not
within the county of Gloucester, or within
200 yards of the boundary. *Levi v. Per-
ratt.* 345

II. *Appearance.*

At what Time to be entered.

2. Where the eighth day after service of a
writ of summons falls on any day between
the Thursday next before, and the Wednes-
day next after Easter day, the last day for
entering an appearance thereto is the
Wednesday next after Easter day, the rule
of court of Easter term, 2 W. 4, being
overridden by the statute 2 W. 4, c. 31,
s. 11. *Harris v. Robinson.* 908

- III. *Declaration against a Prisoner, under*
1 & 2 Vict. c. 110, s. 3.

3. Where the defendant is in custody under a
writ of *capias* issued under the 1 & 2 Vict.
c. 110, s. 3, in an action commenced by
writ of summons, it is sufficient to file a de-
claration, and to serve the defendant with
notice thereof. *Neale v. Snoultten.* 322

IV. *Irregularity.*

Waiver of.

4. An omission to state in the plaint in a
court-baron the nature of the action, is a
mere irregularity, which may be waived.
Brown v. Gill. 861

V. *Judgment as in Case of a Nonsuit.*

5. *Semble*, that a defendant is not entitled to
judgment as in case of a nonsuit where the
plaintiff has allowed two assizes to elapse
without proceeding to trial after issue joined
on a feigned issue under the tithe-commu-
tation act, 6 & 7 W. 4, c. 71, s. 46; but
should move for the costs of the action under
that section. *Tomlinson v. Boughey.* 844

VI. *Judgment non obstante veredicto.*

6. A plaintiff is never entitled to judgment

non obstante veredicto upon the ground of
the insufficiency of the defendant's plead-
ing, where the issue on the plea or rejoinder
is found for the defendant, unless such
plea, or rejoinder, contains, expressly or im-
pliedly, an admission of the plaintiff's title.
Pim v. Grazebrook. Page 429

VII. *Reference to the Master to compute Prin-
cipal and Interest.*

7. The court refused to refer it to the Master
to compute principal and interest on a co-
venant to pay over to the plaintiff the first
fruits or proceeds which should be realized,
and be at the disposition of the defendant,
under a writ of *sequestrari facias*. *Smith v.
Nesbitt.* 288

VIII. *Upon Bond given by a Trader under*
1 & 2 Vict. c. 110, s. 8.

See BANKRUPT.

IX. *Staying Proceedings.*i. *On equitable Grounds.*

8. A. assigned to B., by way of security for a
loan of 10,000*l.*, two sums of 5000*l.* each,
due from C. to A. under two several inden-
tures, and afterwards brought debt against
C. upon those indentures:—"The court re-
fused to stay the proceedings in the action
at the instance of B. and C., and suggested
that the proper course was to apply after
judgment to stay execution. *Seppings v.
Nokes.* 292

And see FEIGNED ISSUE.

VENUE.

PRESENTATION.

I. *Effect of.*

- Patron of *donative* by presenting his clerk to
the ordinary renders it *presentative*. *The
Queen v. Foley.* 664

PRESENTATIVE.

See CHAPEL OF EASE.

PRISONER.

Declaration against.

See PRACTICE, III

PRIVATE ACT.

Construction of.

See CHAPEL OF EASE.

PRIVILEGED COMMUNICATION.

See LIBEL.

SLANDER.

PROBABLE CAUSE.

Semble, that no action will lie for inciting a
third party to bring a civil action against
the plaintiff without reasonable or probable
cause. *Fiaz v. Nicholls.* 501

And see COURTS or REQUESTS, pl. 1.

PROCESS.

See PRACTICE, pl. 1.

PROMISSORY NOTE.
See **BILLS AND NOTES.**

PROMOTIONS.
Pp. 366, 748.

QUARE IMPEDIT.
See **CHAPEL OF EASE.**

RAILWAY SHARES.
A contract for the sale of railway shares may be the subject of an action at law. *Tempest v. Kilner.* Page 300

RATIFICATION.
See **TRESPASS, I. pl. 2.**

READINESS AND WILLINGNESS.
See **PLEADING, I. ii.**

REGULÆ GENERALES.
I. *Tazation of Costs.*
See p. 789.

II. *Examination and Admission, etc., of Attorneys.*
See pp. 790-799.

REMANET.
Costs of.
See **COSTS, II.**

REQUESTS, COURTS OF.
See **COURTS OF REQUESTS.**

RULE TO COMPUTE.
See **PRACTICE, VII.**

RULES OF COURT.
See **REGULÆ GENERALES.**

SAFELY AND SECURELY.
Variable Meaning of these Terms.
See p. 883 (a).

SALE.
See **CONTRACT, pl. 2, 3.**
RAILWAY SHARES.

SECURITY FOR COSTS.
See **COSTS, IV.**

SEIGNIORY IN GROSS.
See p. 871 (d).

SEQUESTRATION.
See **PLEADING, III.**
PRACTICE, VII.

SET-OFF.
See **PLEADING, pl. 1.**

SHERIFF.

I. *Certificate by.*
See **WRIT OF INQUIRY.**
WRIT OF TRIAL, II.

II. *Justification of a Seizure by, under a F. Fa.*
See **TRESPASS, I.**

SHERIFF'S COURT.

An application for a rule that a defendant might be furnished with a copy of the notes taken by the judge of the sheriff's court, London, on a former trial between the same parties, was refused. *Parkhurst v. Gooden.* Page 894

SIGNATURE OF COUNSEL.
See **SPECIAL CASE.**
WRIT OF TRIAL, I.

SILK MANUFACTURE.
See **LETTERS-PATENT.**

SLANDER.

Privileged Communications.
Quare, whether a caution bonâ fide given to a tradesman, without any inquiry on his part, not to trust another, falls within this exception.
Held, by Tindal, C. J., and Erle, J., that it does.
Held, by Coltman and Cresswell, J., that it does not. *Bennett v. Deacon.* 629

SPECIAL CASE.
Signature of Counsel.

A verdict having been taken for the plaintiff, subject to a case to be settled by a barrister, and the defendant having refused to procure the signature of a sergeant to the case when so settled, a rule was made—that the record and postea should be delivered by the associate to the plaintiff, unless the defendant caused the case to be signed within a week. *Doe dem. Phillips v. Rollings.* 843

STAMP.

Letter or Power of Attorney.
1. A written authority in the following terms, "I authorize you to endorse my name to three several bills of exchange now in your possession," (describing them,) was held to be a *letter or power of attorney*, requiring a 30s. stamp, under 55 G. 3, c. 184. *Walker v. Remmett.* 850
2. So, although it went on to say—"and which endorsement I undertake shall be binding upon me; and I undertake to pay you the amount of the several bills as they respectively become due, should they not be duly honoured when mature." *Ibid.*

STATUTE OF FRAUDS.

I. *Case within the Fourth Section.*
1. A. enters the service of B. under a written agreement as follows:—"I agree to receive

you as clerk in my establishment, in consideration of your paying me a premium of 300*l.*, and to pay you a salary at the following rates, viz., for the first year, 70*l.*; for the second, 80*l.*; for the third, 110*l.*; for the fourth, 130*l.*; and 150*l.* for the fifth and following years that you may remain in my employment:—"

Held, that the agreement was one that by the statute of frauds was required to be in writing; that, there being a precise stipulation for yearly payments, evidence was not admissible to show that at or after the time the letter containing it was sent by B. to A., it was verbally agreed that the salary should be paid quarterly; and that the fact of the payments having usually been made quarterly, did not vary the rights of the parties. *Giraud v. Richmond*. Page 835

II. *Case not within the Fourth Section.*

2. A contract for the maintenance of a child at the defendant's request, to continue "so long as the defendant shall think proper," is a contract upon a contingency, the performance of which is not necessarily to take place beyond the space of a year, and therefore is not within the statute. *Souch v. Stravbridge*. 808
3. *Semble*, per Tindal, C. J., that the statute does not apply where the action is brought upon an executed consideration. *Ibid*.

STAY OF PROCEEDINGS.

See BANKRUPT.
PRACTICE, IX.

STEWARD.

See COURT-BARON, pl. 1, 2, 3.

SUMMONS, WRIT OF.

See PRACTICE, pl. 1, 2.

TIME.

Computation of.
See CONTRACT, pl. 1.
HOLIDAYS.

TITHES.

- I. *Exemption from, of Party prescribing in non decimando.*

Under 2 & 3 W. 4, c. 100, s. 1, a lay landowner can establish a prescription in non decimando by proof of non-payment for one of the periods named in the statute, without showing the legal origin of the exemption; although the exemption was claimed, not in respect of all tithes, but in respect of particular articles, some being of modern introduction: per Coltman and Erle, J. Per Tindal, C. J., and Crosswell, J., he cannot. *Salkeld v. Johnson*. 749

II. *Issue under 6 & 7 W. 4, s. 71, s. 46.*

i. *Costs upon.*
See COSTS.

- ii. *Judgment as in a Case of a Nonsuit for not proceeding on.*
See PRACTICE, V.

TRESPASS.

I. *Justification under Fi. Fa.*

1. The sheriff having seized certain goods in the house of A., under a *fi. fa.* against him at the suit of B., and a claim having been made by C. under a bill of sale, B. not choosing to contest the claim so made by C., his attorneys gave the sheriff a direction to withdraw, in the following terms: "A. v. B. Withdraw under the *fi. fa.* herein, the goods having been claimed." The officer finding that the bill of sale under which C.'s claim was made did not convey the whole of the goods he had seized, retained possession of those to which the claim did not apply; and three days afterwards informed the attorneys for the execution-creditor what he had done. The attorneys, as well as the execution creditor, expressed their approbation of the course the officer had adopted, the former observing that the direction to withdraw was only intended to apply to the goods that were the subject of the claim.

In trespass for entering the house and seizing and converting the goods, the sheriff justified entering under the writ. The plaintiff replied, admitting the writ and warrant, that, after the seizure, A. discharged and forbade the defendants from further executing the writ, and new-assigned that he brought his action for the subsequent trespass and conversion. The defendants, in their rejoinder, traversed the discharge to the sheriff:—

Held, that, construing the direction to the sheriff to withdraw, with reference to the surrounding circumstances, it amounted to no more than a partial direction—to retire from the possession of the goods to which C.'s claim applied. *Walker v. Hunter*.

Page 824

2. *Held*, also, that the subsequent ratification by A. of the detention of the rest of the goods—being an act done for his benefit—was a sufficient justification to the sheriff. *Ibid*.

3. *Held*, also, that the issue was not divisible, and therefore that A. would not be entitled to recover, even though it should appear that some of the goods subsequently detained, were within the claim. *Ibid*.

II. *Justification under Metropolitan-Police Act.*

4. The 54th section of the metropolitan-police act imposes a penalty upon any person who shall wilfully and wantonly disturb any in

habitant, by pulling or ringing any door-bell, or knocking at any door without lawful excuse.

Section 63 empowers any constable belonging to the metropolitan-police district, to take into custody, without warrant, any person who shall "within view" of such constable offend against the act.

Section 66 enacts, "that any person found committing any offence punishable either upon indictment or as a misdemeanor upon summary conviction, by virtue of this act, may be taken into custody, without a warrant, by any constable, or may be apprehended by the owner of the property on, or with respect to, which the offence shall be committed, or by his servant, or any person authorized by him; and may be detained until he can be delivered into the custody of a constable to be dealt with according to law."

In trespass by A. against B. for false imprisonment, B. justified, on the ground of A. having wilfully and without excuse, within view of the constable who apprehended her, annoyed and disturbed the defendant and his family by knocking and ringing at his door:—*Held*, that, to support this plea under sections 54 and 63, it was necessary to prove an offence committed within view of the constable. *Simmons v. Millingen*. 524

6. And, *held*, that the plea afforded no justification under s. 66, inasmuch as it did not allege that A. was "found committing" the offence at the time of apprehension, or that B. was the owner of the property on or with respect to which the offence was committed. 524

TRIAL, WRIT OF.

See pp. 789, 911.

TROVER.

Change of Property by Judgment in.

See p. 540.

UNDERTAKING TO GIVE MATERIAL EVIDENCE.

See VENUE.

USURY LAWS.

- I. *Exception from Relaxation of, in Case of landed Security.*

1. The exception in the 2 & 3 Vict. c. 37, (continued by the 3 & 4 Vict. c. 83, and the 4 & 5 Vict. c. 54,) as to loans or forbearance of any money upon security of lands, tenements, or hereditaments, or any estate of interest therein, is not retrospective. *Bell v. Coleman*. 268

2. A. became indebted to B. in 100*l.* upon bills discounted at usurious interest, (since 7 W. 4, and 1 Vict. c. 80,) and being af-

terwards pressed for payment, deposited with B., as collateral security, a deed for securing an annuity payable out of real property, nothing being said at the time, as to the rate of interest to be paid for the further forbearance. A bill for 1000*l.* was afterwards given by A. to B. in respect of the debt, and renewed from time to time at 10*l.* per cent. interest. All this took place prior to the passing of the 2 & 3 Vict. c. 37:—*Held*, that the subsequent dealing in respect of the bills, did not invalidate the deposit of the deed. *Bell v. Coleman*.

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VARIANCE.

Between Declaration and Proof.

See GUARANTEE, 1, 4.

VENUE.

Bringing back.

Construction of undertaking.

1. The undertaking to give material evidence is satisfied by proof of any fact which materially conduces to the establishing of matter which may be in issue, arising in the county to which the cause is restored, or tending to enhance the damages—per Tindal, C. J., and Maule and Cresswell, Ja.; *dissentiente*, Erle, J., who held that the undertaking binds the plaintiff to prove some matter arising in the original county, indispensable to the maintenance of the action, or tending to enhance the damages. *Clark v. Dunsford*. 724
2. So, although the course of the pleadings or of the evidence may render such fact immaterial. *Ibid.*
3. Therefore, in an action for crim. con., an act done in Middlesex in furtherance of a plan for hiring lodgings at Bath, for the purpose of facilitating the commission of adultery there, was held by Tindal, C. J., and Maule and Cresswell, Ja., to be a sufficient compliance with an undertaking to give material evidence in Middlesex; *dissentiente*, Erle, J. 724

VERIFICATION.

See INSOLVENT DEBTOR, pl. 3.

WAGER.

See FRIGNED ISSUE.

WAGES.

See LIMITATION OF ACTIONS, pl. 3.

WARRANT OF ATTORNEY.

I. *Joint or Several.*

1. A warrant of attorney executed by two persons, authorizing attorneys to appear

"for us and each of us," and to receive a declaration "for us and each of us," in an action of debt, &c., and, after judgment entered up, "for us in our name, and as our act and deed," to execute a release of errors, &c., is *joint* only, and not *joint and several*.
Dairymple v. Fraser. Page 698

II. Form of Attestation.

2. In the attestation of the execution of a warrant of attorney or cognovit, under 1 & 2 Vict. c. 110, s. 9, it is not necessary that the precise words of the statute be followed: it is enough if it appear by necessary inference, that the witness attended as the attorney for the party, at his request, and that he subscribed his name as such attorney.
Lewis v. Lord Kensington. 463

3. An attestation in the following form—
"Signed, sealed and delivered in the presence of E. F., attorney for the said C. D., and expressly named by him, and attending at his request. And I hereby subscribe myself to be the attorney for him, having read over and explained to him the nature and effect of the above warrant of attorney, before the same was executed by him; and I hereby subscribe my name as a witness to the due execution thereof." The signature was of the proper handwriting of E. F., the attorney.—*Held*, a sufficient compliance with the statute. 463

WITNESS.

I. Competency of.
See EVIDENCE.

II. Examination of.
See COMMISSION.

WORK AND LABOUR.

A. was employed by B. to devise a method of curving metal tubing for the purpose of

manufacturing life-buoys, of which B. was patentee:—*Held*, that A. might recover compensation for the labour and skill, and also the value of the materials, employed by him in the course of the work, under a count for work and labour and materials.
Grafton v. Armitage. 336

WRIT OF SUMMONS.

See PRACTICE, pl. 1.

WRIT OF INQUIRY.

Upon the execution of a writ of inquiry addressed to the sheriff, in an action for a malicious prosecution, a certificate to entitle the plaintiff to costs, the damages being under 40s., is properly signed by the under sheriff signing in the name of the sheriff.
Stroud v. Watts. 929

WRIT OF TRIAL.

I. Form of Issue.

1. The signature of counsel to the pleadings need not appear in the issue delivered.
Jefferies v. Yablonski. 781
2. An issue delivered in a cause to be tried before the sheriff under the 3 & 4 W. 4, c. 42, s. 17, with a blank for the *teste* of the writ of trial, is defective. The proper course for the defendant to pursue, is, to apply to a judge at chambers to amend the issue at the plaintiff's expense. *Ibid.*
3. It is no ground of objection that a blank is left for the *return* of the writ of trial. *Ibid.*

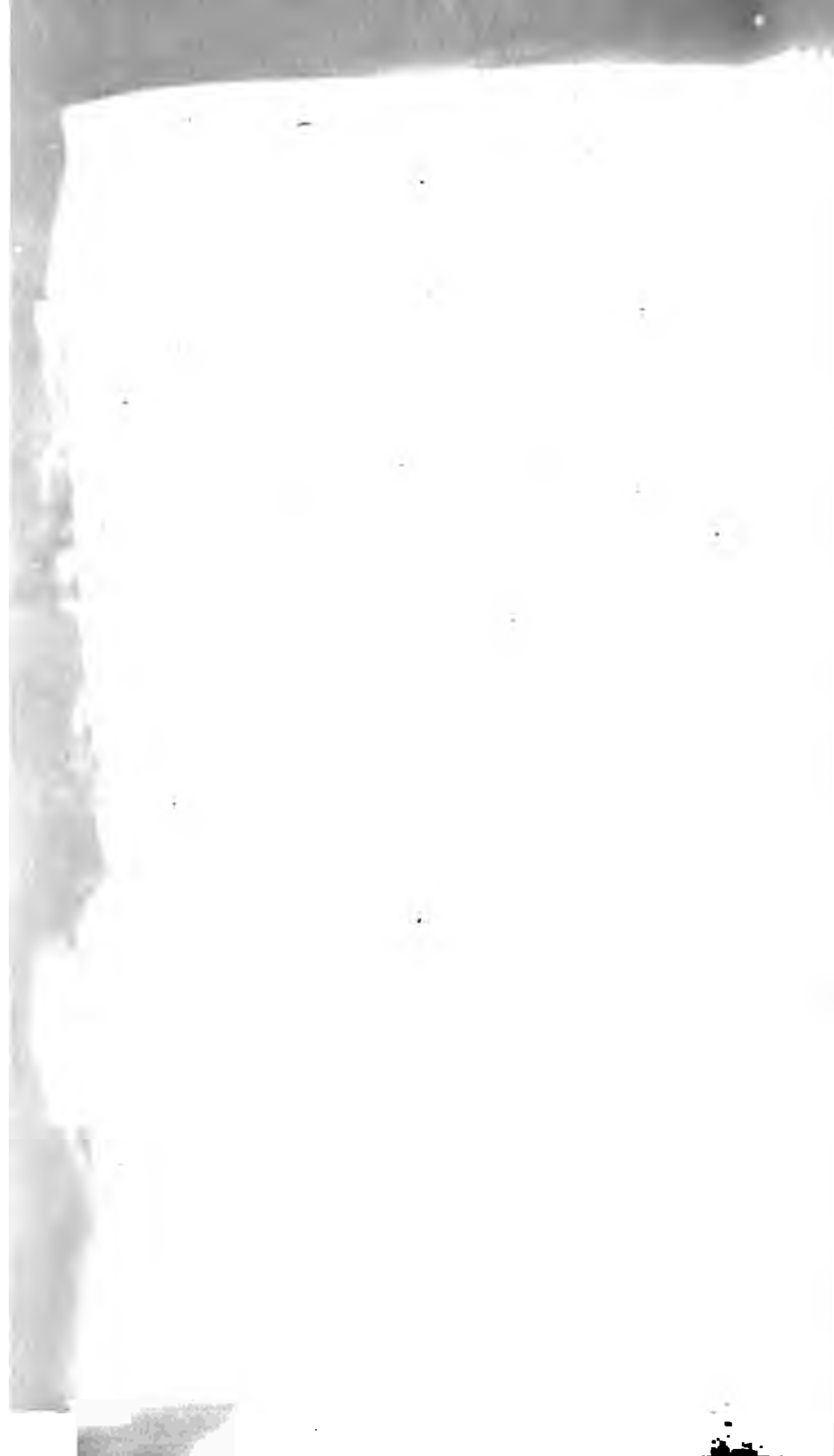
II. Certificate under Court of Requests Act.

4. The sheriff or inferior judge to whom a writ of trial is directed, has no authority to certify, under the Tower Hamlet's court of requests act, that there was probable or reasonable cause of action for 40s. *Capes v. Jones.* 911









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